Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

WARREN AND TAMMY STANCOURT,
PARENTS OF GREGORY STANCOURT,
Petitioners,

v.

THE WORTHINGTON CITY SCHOOL DISTRICT,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Ohio Tenth Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a school district's violation of a procedural requirement mandated by the Individuals with Disabilities Education Act only actionable upon a finding of substantive harm resulting from the violation?

2. What constitutes a change in placement sufficient to invoke the stay-put rule under the Individuals with Disabilities Education Act?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than those listed on the caption.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

INTRODUCTORY PRAYER 1

OPINIONS BELOW 1

INDEPENDENT HEARING OFFICER DECISIONS (IHO) 1

STATE LEVEL REVIEW OFFICER DECISION (SLRO) 2

THE FRANKLIN COUNTY COURT OF COMMON PLEAS DECISIONS 3

THE TENTH APPELLATE DISTRICT COURT OF APPEALS 6

THE FRANKLIN COUNTY COURT OF COMMON PLEAS DECISIONS AFTER REMANDED BY TENTH DISTRICT APPELLATE COURT DECISION 10

THE TENTH APPELLATE DISTRICT COURT OF APPEALS (SECOND APPEAL) 13

THE OHIO SUPREME COURT 13

JURISDICTION 14

STATUTE INVOLVED 14

STATEMENT OF THE CASE 16

REASONS FOR GRANTING THE WRIT 20

I. THE DECISION OF THE COURT OF APPEALS WITH RESPECT TO THE DISTRICT'S PROCEDURAL VIOLATION IS NOT SUPPORTED BY THE INTENT AND SCOPE OF THE IDEA 21

II. WHAT CONSTITUTES A CHANGE IN "EDUCATIONAL PLACEMENT" IS AN AMBIGOUS INQUIRY 26

III.CONCLUSION 29

APPENDIX

Appendix A: Court of Appeals of Ohio Opinion, September 9, 2008 ..... 1a

Appendix B: Court of Common Pleas, Franklin County Ohio Decision and Entry, July 26, 2007 ..... 25a

Appendix C: Court of Common Pleas, Franklin County Ohio Magistrate Decision and Recommendation, March 20, 2007 ..... 36a

Appendix D: Court of Appeals of Ohio Opinion, October 27, 2005 ..... 63a

Appendix E: Court of Common Pleas, Franklin County Ohio Decision on the Merits, June 4, 2004 ..... 103a

Appendix F: Court of Common Pleas, Franklin County Ohio Judgment Entry, April 30, 2004 ..... 124a

Appendix G: State of Ohio Department of Education Final Decision and Entry, May 12, 2003 ..... 127a

Appendix H: State of Ohio Department of Education Decision, February 13, 2003 ... 136a

Appendix I: State of Ohio Department of Education Decision, October 22, 2002 .... 140a

Appendix J: State of Ohio Department of Education Decision, October 2, 2002 ..... 144a

Appendix K: Ohio Supreme Court Entry, February 4, 2009 ..... 148a

TABLE OF AUTHORITIES

CASES

Austintown Local School Dist. Bd. of Edn. v. Mahonig Cty. Bd. Of Mental Retardation & Dev. Disabilities,
66 Ohio St.3d 355 (1993) 7

AW ex. rel Wilson v. Fairfax County School Bd.,
372 F.3d 674 (4th Cir. 2004) 28

Bd. of Edn v. Ill. State Bd. of Edn.,
103 F. 3d 545 (7th Cir. 1996) 28

Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley,
458 U.S. 176 (1982) . . . . . *passim*

Berger v. Medina City Sch. Dist.,
348 F.3d 513 (6th Cir. 2003) 10

Brimmer v. Traverse City,
872 F. Supp 447 (1994) 6, 8, 10

Burilovich v. Board of Educ.,
208 F.3d 560 (6th Cir. 2000) 26

Carnes v. Kemp,
104 Ohio St.3d 629 (2004) 7

Cavanagh v. Grasmick,
75 F. Supp. 2d 446 (D. Md. 1999) 28

Chambers v. NASCO, Inc.,
501 U.S. 32 (1991) 9

Clemens v. Gilbert,
2007-Ohio-6072, Blemont App. No. 06 BE 57 (2007) 13

Collingsgru v. Palmyra Bd. of Edn.,
161 F.3d 225 (3rd Cir. 1998) 29

Cordrey v. Euckert,
917 F.2d 1460 (6th Cir. 1990), *cert. denied* 499 U.S. 938 (1991) 6, 11, 21

Cremeans v. Fairland Local School Dist. Bd. of Edn.,
663 N.E.2d 570 (1993) 5

Crisp v. Scioto Residential Serv.,
2004-Ohio-6349, (Scioto App. No. 03CA2918) . 9

Dima v. Macchiarola,
513 F. Supp. 565 (D.C. N.Y. 1981) 21

Doe v. Alabama State Dept. of Educ.,
915 F.2d 651 (11th Cir. 1990) 21

Dong v. Board of Educ.,
197 F. 3d 793 (6th Cir. 1999) 26

Dressler Coal Co. v. Div. of Reclamation, Ohio Dept. of Natural Resources,
23 Ohio St.3d 131 (1986) 9

Fields v. Summit Cty. Executive Branch,
83 Ohio App.3d 68 (1992) 9

Georgia Dept. of Ed v. Cherry,
314 F.3d 545 (11th Cir. 2002) 27

Hall v. Vance,
774 F.2d 629 (4th Cir. 1985) 22, 23, 25

Honig v. Doe, et al.,
484 U.S. 305 (1988) 1, 5, 11

Jackson v. Franklin County School Bd.,
806 F.2d 623 (5th Cir. 1986) 25

John M. v. Board of Educ. of Evanston Tp. High School Dist.,
502 F.3d 708 (7th Cir. 2007) 27

Jones v. Hartranft,
78 Ohio St.3d 368 (1997) 9

Knable v. Bexley City School Dist.,
238 F.3d 755 (6th Cir. 2001) 8, 11, 23

Lachman v. Illinois State Bd. Of Educ.,
852 F.2d 290 (7th Cir. 1988) 11

Lunceford v. District of Columbia Board of Education,
745 F.2d 1577 (D.C. Cir. 1984) 6, 11

McLaughlin v. Holt Pub. Schools Bd. of Edn.,
320 F.3d 663 (6th Cir. 2003) 11

Metropolitan Government of Nashville and Davidson County Tenn.,
25 IDELR 594 (February 25, 1997) 6

Meyer v. Nebraska,
262 U.S. 390 (1923) 20

Morgan v. Chris L.,
106 F.3d 401 (6th Cir. 1997) 5, 11

N.L v. Knox County Schools,
315 F.3d 688 (6th Cir. 2003) 26

Quonset Hut, Inc. v. Ford Motor Co.,
684 N.E.2d 319 (1997) 3

Sazima v. Chalko,
712 N.E.2d 729 (1999) 3

Schaffer v. Weast,
546 U.S. 49 (2005) 20

School Committee of the Town of Burlington v. Department of Education of Massachusetts, et al., 471 U.S. 359 (1985) 1

Schreiner v. Karson,
52 Ohio App.2d 219 (1977) 9, 11

Smith v. Robinson,
468 U.S. 992 (1984) 5

Spilsbury v. District of Columbia,
307 F. Supp.2d 22 (D.C. Cir. 2004) 27

State v. Hartman,
93 Ohio St.3d 274, 2001-Ohio-1580 (2001) ... 13

State ex rel. Methodist Book Concern v. Guckenberger,
57 Ohio App. 13 (1937) 9

Tanya v. Cincinnati Bd. of Edn.,
100 Ohio App.3d 52 (1995) 7

Tennessee Dept. of Mental Health v. Paul B.,
88 F.3d 1466 (6th Cir. 1996) 5, 8, 10, 26

Thomas v. Cincinnati Bd. of Edn.,
918 F.2d 618 (6th Cir. 1990) 5, 6, 8, 9, 11

Tokles & Son, Inc. v. Midwestern Idemn. Co.,
605 N.E.2d 936 (1992) 3

Union Sch. Dist. v. Smith,
15 F.3d 1519 (9th Cir. 1994) 25

Verhoven v. Brunswick Sch. Comm.,
207 F.3d 1 (1st Cir. 1999) 17

Vogel v. School Board,
491 F. Supp. 989 (W.D. MO 1980) 21

STATUTES

20 U.S.C. § 1400 ..... 14, 16
20 U.S.C. § 1400(d)(1)(A) 16
20 U.S.C. § 1400(d)(1)(B) 20
20 U.S.C. § 1412 16
20 U.S.C. § 1414 13
20 U.S.C. § 1415 ..... *passim*
20 U.S.C. § 1415(a) 14
20 U.S.C. § 1415(b) 15
20 U.S.C. § 1415(b)(3) 17, 22
20 U.S.C. § 1415(b)(3)A 18
20 U.S.C. § 1415(E)(ii) 15, 24
20 U.S.C. § 1415(E)(iii) 15, 24
20 U.S.C. § 1415(f) 17

20 U.S.C. § 1415(g) 17
20 U.S.C. § 1415(j) 8, 15, 17, 26
28 U.S.C. § 1257(a) 14
Ohio Rev. Code Chapter 119 7
Ohio Rev. Code Chapter 3323 . . . . . 4, 7, 10, 13, 16
R.C. 3323.03 16
R.C. 3323.04 16
R.C. 3323.05 (C) and (E) 17

RULES

Sup. Ct. R. 13.1 14
Sup. Ct. R. 13.3 14

REGULATIONS

34 CFR 300.503 17
Ohio Admin. Code Chapter 3301-51 16
Ohio Admin. Code 3301-51-08 . . . . . 4, 7, 10, 13
Ohio Admin. Code 3301-51-08(J)(1) 1
Ohio Admin. Code 3301-51-08(5)(4) 1

INTRODUCTORY PRAYER

The Petitioner respectfully requests that a writ of *certiorari* be granted to review the judgment and opinion of the Tenth District Court of Appeals for the State of Ohio entered in this proceeding on September 9, 2008.

OPINIONS BELOW

INDEPENDENT HEARING OFFICER DECISIONS (IHO)

1. On October 2, 2002, the Impartial Hearing Officer (IHO), Linda F. Mosbacher, after her analysis of the Ohio Administrative Code 3301-51-08(J)(1) and 3301-52-08(5)(4) and the Supreme Court cases *School Committee of the Town of Burlington v. Department of Education of Massachusetts, et al.*, 471 U.S. 359 (1985), and *Honig v. Doe, et al.*, 484 U.S. 305 (1988), concluded that if a disputed IEP proposes to change program placement on the continuum of potential placements, then the last agreed-upon IEP is the "stay-put" placement, but if the dispute involves the provision of services only, then the disputed IEP can be the "stay-put" placement provided the school district has implemented the change pursuant to a PS-401 Prior Written Notice Form. Therefore, the IHO held that the child's "stay-put" placement is his current education placement as set forth in the January, 2002 IEP and the service changes provided in the February, March, and April addendum. This unpublished opinion by the IHO is reprinted in Appendix J.

2. On October 22, 2002, the Impartial Hearing Officer (IHO), Linda F. Mosbacher, resolved a separate issue outside of the "stay-put" and "change of placement" issues in this case and ruled on the release of Gregory Stancourt's medical records. This unpublished opinion by the IHO is reprinted in Appendix I.

3. On February 13, 2003, the Impartial Hearing Officer (IHO), Linda F. Mosbacher, granted the Worthington City School District's motion to dismiss the hearing with prejudice due to the failure of the Stancourts to comply with the October 22, 2002 IHO's order for the release of records. This unpublished opinion by the IHO is reprinted in Appendix H.

STATE LEVEL REVIEW OFFICER DECISION (SLRO)

4. The Stancourts appealed the Impartial Hearing Officer's (IHO) decision to grant the Worthington City School District's motion to dismiss the hearing with prejudice asserting two assignments of error as follows: (1) the IHO improperly and prematurely dismissed the action with prejudice and without notice to the Parents, in violation of state and federal law; and (2) the IHO erred when she ruled in favor of the District regarding stay-put despite strong evidence that the Parents did not receive prior written notice before the District's unilateral implementation of the IEP she found to be the stay-put. On May 12, 2003, the State Level Review Officer (SLRO), Monica Bohlen, concluded that the IHO did not err in

dismissing the case, but she did err in dismissing it with prejudice. The SLRO explained that the Stancourts may reopen the case at such time that they have complied with the condition of tendering to the District all of the signed releases that have already been furnished to them and have filed to reopen the case in the same manner required for the filing of request for due process hearings. In reaching her decision, the SLRO reviewed the two cases cited by the IHO and also reviewed *Quonset Hut, Inc. v. Ford Motor Co.*, 80 Ohio St.3d 46, 684 N.E.2d 319 (1997), quoting *Tokles & Son, Inc. v. Midwestern Idemn. Co.*, 65 Ohio St.3d 621, 632, 605 N.E.2d 936, 944 (1992) and *Sazima v. Chalko*, 86 Ohio St.3d 151, 712 N.E.2d 729 (1999). This unpublished opinion by the SLRO is reprinted in Appendix G.

THE FRANKLIN COUNTY COURT OF COMMON PLEAS DECISIONS

5. On June 18, 2003, the Stancourts filed their Notice to Appeal of an administrative decision. The case was assigned to Judge Johnson as case number 03 CV 06746 and on July 29, 2003, the Worthington City School District filed its Motion to Dismiss the appeal on the grounds that the Notice was improper. On October 31, 2003, Judge Johnson granted the Motion to Dismiss making it clear on his entry that the Stancourts were in no way barred from filing a "timely, proper notice of appeal" because the time for filing their appeal never began to run.

6. On November 14, 2003, the Stancourts filed their timely Notice of Appeal, which was given a new case number 03 CV 12578. On January 22, 2004, the Stancourts filed their Brief on the Merits, but due to a clerical error, the Stancourts filed their Brief under the first case number. Without being made aware of the clerical error, Judge Schneider issued a Notice of Final Appealable Order under the first case number and stated that the court would not consider the Brief due to the fact that the case had previously been terminated. However, after the court learned of the clerical error, Judge Schneider issued an Entry on April 30, 2004, stating that the court deemed this matter ripe for review and would consider and review the Stancourts' Briefs filed in this matter. This unpublished opinion by Judge Schneider is reprinted in Appendix F.

7. On June 4, 2004, Judge Schneider ruled in favor of the Worthington City School District finding that the decision of the IHO as to the stay-put conclusion was not in error. However, in Judge Schneider's opinion, the dismissal of the due process hearing was an error and ordered that the matter be remanded for actions consistent with this decision. In rendering his decision on the dismissal of the due process hearing, Judge Schneider considered the Ohio Revised Code Chapter 3323, *et seq.*; the Ohio Administrative Code 3301-51-08, *et seq.*; and 20 U.S.C. 1415, *et seq.*, along with the following numerous cases to set forth his standard and scope of review:

a. *Smith v. Robinson*, 468 U.S. 992, 104 S. Ct. 3457, 82 L.Ed.2d 746 (1984);

b. *Cremeans v. Fairland Local School Dist. Bd. of Edn.*, 91 Ohio App.3d 668, 663 N.E.2d 570 (1993);

c. *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 597-598, 98 L.Ed.2d 686, 699 (1988);

d. *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, at 205-206, 102 S.Ct. 3034, at 3051, 73 L.Ed.2d 690, at 711-712 (1982); and

e. *Thomas v. Cincinnati Bd. of Edn.*, 918 F.2d 618, 624 (6th Cir. 1990).

Judge Schneider's review led him to determine that while the Hearing Officer has the right to conduct the proceedings in the manner found appropriate and to set the parameters for evidentiary presentation, the decision to dismiss, especially with prejudice, for the failure to provide discovery of the child's medical and psychological records, was unduly draconian. In rendering his decision on the stay-put conclusion, Judge Schneider again considered the aforementioned O.R.C., O.A.C., and U.S.C. sections, but also relied on the additional cases as follows:

a. *Tennessee Dept. of Mental Health v. Paul B.*, 88 F.3d 1466 (6th Cir. 1996);

b. *Morgan v. Chris L.*, 106 F.3d 401 (6th Cir. 1997);

c. *Lunceford v. District of Columbia Board of Education*, 745 F.2d 1577, 241 U.S. App. D.C. 1 (D.C. Cir. 1984);

d. *Brimmer v. Traverse City*, 872 F. Supp 447 (1994);

e. *Cordrey v. Euckert*, 917 F.2d 1460 (6th Cir. 1990), cert. denied 499 U.S. 938, 111 S.Ct. 1391 (1991);

f. *Metropolitan Government of Nashville and Davidson County Tenn.*, 25 IDELR 594 (February 25, 1997); and,

g. *Thomas v. Cincinnati Bd. of Edn.*, 918 F.2d 618, 624 (6th Cir. 1990).

Judge Schneider's review led him to hold that the intent of the stay-put provision was to keep the status quo as to the larger setting of school and class and changing the routine, whether agreed to by the parents or not, is not contemplated as a change in placement. This unpublished opinion by Judge Schneider is reprinted in Appendix E.

THE TENTH APPELLATE DISTRICT COURT OF APPEALS

8. Both parties appealed Judge Schneider's June 4, 2004 decision to the Tenth District Appellate Court. On October 27, 2005, the appellate court issued its unanimous decision overruling Worthington City School District's motion to dismiss and its cross-assignment of error in which it asserted that the Common Pleas Court

erred in finding that the State Level Review Officer lacked authority to dismiss the special education due process request based on appellants' repeated failures to comply with the impartial hearing officer's order, and sustaining the Stancourts' sole assignment of error in which they asserted that the trial court committed reversible error in finding that the April 10 IEP addendum was part of the Stancourts' son's stay-put IEP. In rendering their decision to overrule Worthington City School District's motion to dismiss and sustain the Stancourts' sole assignment of error, the Tenth District Appellate Judges considered the Ohio Revised Code Chapter 3323, *et seq.*; the Ohio Administrative Code 3301-51-08, *et seq.*; 20 U.S.C. 1415, *et seq.*; and Ohio Revised Code Chapter 119, along with the following numerous cases to set forth their standard and scope of review:

a. *Austintown Local School Dist. Bd. of Edn. v. Mahonig Cty. Bd. Of Mental Retardation & Dev. Disabilities*, 66 Ohio St.3d 355 (1993);

b. *Tanya v. Cincinnati Bd. of Edn.*, 100 Ohio App.3d 52 (1995);

c. *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S.176, 206-207, 102 S.Ct. 3034. 3051, 73 L.Ed.2d 690, 711-713 (1982);

d. *Carnes v. Kemp*, 104 Ohio St.3d 629, 2004-Ohio-7107 (2004);

e. *Knable v. Bexley City School Dist.*, 238 F.3d 755 (6th Cir. 2001);

f. *Brimmer v. Traverse City Area Pub. Schools*, 872 F.Supp. 447, 449 (W.D. Mich. 1994);

g. *Thomas v. Cincinnati Bd. of Edn.*, 918 F.2d 618, 624 (6th Cir. 1990);

h. *Tennessee Dept. of Mental Health v. Paul B.*, 88 F.3d 1466 (6th Cir. 1996);

i. *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S.176, 206-207, 102 S.Ct. 3034. 3051, 73 L.Ed.2d 690, 711-713 (1982);

The Appellant Court Judges' review led them to decide that the matter should be remanded to the common pleas court so that it can make a requisite finding whether the change reflected in the addendum of April 10, 2002, implicated a detrimental change in the elements of the Stancourts' son's IEP, or whether the change reflected in the addendum of April 10, 2002, fundamentally changed or eliminated a basic element of the Stancourts' son's IEP, thereby implicating the "stay-put" provision of Section 1415(j), Title 20, U.S. Code. Furthermore, because the evidence suggests that the Stancourts' received notice of the implementation of the April 10, 2002 addendum two days after this addendum was implemented, upon remand, the common pleas court should also consider whether the school district complied with procedural requirements under the IDEA and, if not, whether such deviation resulted in substantive harm. In rendering their decision finding the SLRO lacked authority to dismiss

appellants' due-process-hearing request, the Tenth District Appellate Judges again considered the aforementioned O.R.C., O.A.C., and U.S.C. sections, but also relied on language and holdings in the additional cases as follows:

a. *Crisp v. Scioto Residential Serv., Inc.*, 2004-Ohio-6349, (Scioto App. No. 03CA2918);

b. *Dressler Coal Co. v. Div. of Reclamation, Ohio Dept. of Natural Resources*, 23 Ohio St.3d 131 (1986) U.S. App. Lexis 1041, (January 21, 1997);

c. *Fields v. Summit Cty. Executive Branch*, 83 Ohio App.3d 68 (1992);

d. *State ex rel. Methodist Book Concern v. Guckenberger*, 57 Ohio App. 13, 16-17 (1937);

e. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123 (1991);

f. *Jones v. Hartranft*, 78 Ohio St.3d 368, 371 (1997);

g. *Schreiner v. Karson*, 52 Ohio App.2d 219, 222-223 (1977);

h. *Thomas v. Cincinnati Bd. of Edn.*, 918 F.2d 618, 624 (6th Cir. 1990).

This published opinion by the Tenth District Appellate Judges is reprinted in Appendix D.

THE FRANKLIN COUNTY COURT OF COMMON PLEAS DECISIONS AFTER REMANDED BY TENTH DISTRICT APPELLATE COURT DECISION

9. On March 20, 2007, Magistrate Angel rendered his decision and recommendation ruling in favor of the Worthington City School District finding that the stay-put provision of 20 U.S.C. 1415 did not apply to the April addendum stating that the addendum did not implicate a detrimental change or fundamental change nor did it eliminate a basic element of the IEP or education program and as such, the procedural violation of the late written notice to the Stancourts did not warrant further action. In rendering his decision, Magistrate Angel considered the Ohio Revised Code Chapter 3323, *et seq.*; the Ohio Administrative Code 3301-51-08, *et seq.*; and 20 U.S.C. 1415, *et seq.*; along with the testimony and opinions of expert witnesses, William A. Lybarger, Ph.D. and Kevin Arnold, Ph.D., and the following numerous cases to set forth his standard and scope of review:

   a. *Brimmer v. Traverse City Area Pub. Schools*, 872 F. Supp. 447, 449 (W.D.Mich. 1994);

   b. *Tennessee Dept. of Mental Health v. Paul B.*, 88 F.3d 1466, at 1474 (6th Cir. 1996);

   c. *Berger v. Medina City Sch. Dist.*, 348 F.3d 513 (6th Cir. 2003);

d. *Knable v. Bexley City School Dist.*, 238 F.3d 755 (6th Cir. 2001);

e. *McLaughlin v. Holt Pub. Schools Bd. of Edn.*, 320 F.3d 663 (6th Cir. 2003);

f. *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S.176, 206-207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982);

g. *Schreiner v. Karson*, 52 Ohio App.2d 219, 222-223 (1977);

h. *Thomas v. Cincinnati Bd. of Edn.*, 918 F.2d 618, 624 (6th Cir. 1990).

i. *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 98 L.Ed.2d 686, 699 (1988);

j. *Morgan v. Chris L.*, 106 F.3d 401 (6th Cir. 1997);

k. *Lunceford v. District of Columbia Board of Education*, 745 F.2d 1577, 241 U.S. App. D.C. 1 (D.C. Cir. 1984);

l. *Cordrey v. Euckert*, 917 F.2d 1460 (6th Cir. 1990); and

m. *Lachman v. Illinois State Bd. Of Educ.*, 852 F.2d 290, 206-97 (7th Cir. 1988).

Magistrate Angel's review led him to hold that the tentative change in behavior reinforcement contemplated in the April addendum was neither a fundamental change, nor an elimination of a basic element of education. Therefore, he concluded that the stay-put provision of 20 U.S.C. § 1415 did not apply to the April addendum and as such, the procedural violation of the late written notice to the Stancourts does not warrant further action. This unpublished opinion by Magistrate Angel is reprinted in Appendix C.

10. On July 26, 2007, Judge Schneider rendered his decision adopting the Magistrate's decisions, filed June 28, 2007, and May 15, 2007, on admitting and considering exhibits, and the Magistrate's decision filed March 20, 2007, as described above, and further denying the Stancourts' objections to the Magistrate's March 20, 2007 decision that the Stancourts' filed on April 3, 2007. In his decision, Judge Schneider stated that the Magistrate was in a position to evaluate the witnesses' credibility, weigh the evidence, and make a factual determination, and that his findings of fact and conclusions of law were reasonable and in accordance with the law. Therefore, Judge Schneider adopted the Magistrate's decision that found that no substantive violation or detrimental change occurred and that 20 U.S.C. § 1415's "stay-put" provision did not apply to the April addendum. This unpublished opinion by Judge Schneider is reprinted in Appendix B.

THE TENTH APPELLATE DISTRICT COURT OF APPEALS (SECOND APPEAL)

11. The Stancourts appealed Judge Schneider's July 26, 2007 decision to the Tenth District Appellate Court asserting the single assignment of error that the trial court committed reversible error in finding that Gregory Stancourt was not harmed by the action of Worthington City Schools. On September 9, 2008, Appellate Court Judges French, Klatt and Sadler, issued their unanimous decision overruling the Stancourts assignment of error stating that the Magistrate was free to believe or disbelieve any witness, including an expert witness citing *Clemens v. Gilbert*, 2007-Ohio-6072, Blemont App. No. 06 BE 57 (2007), and that, "once properly before the court, the expert's conclusions became a matter for the trier of fact" Id., quoting *State v. Hartman*, 93 Ohio St.3d 274, 285, 2001-Ohio-1580 (2001). In rendering their decision, the Tenth District Appellate Judges considered the Ohio Revised Code Chapter 3323, *et seq.*; the Ohio Administrative Code 3301-51-08, *et seq.*; and 20 U.S.C. 1414 and 1415, *et seq.*, along with all of the numerous aforementioned cases and decisions to set forth their standard and scope of review.

This published opinion by the Tenth District Appellate Judges is reprinted in Appendix A.

THE OHIO SUPREME COURT

12. The Stancourts appealed to the Ohio Supreme Court. On February 4, 2009 and upon

consideration of the jurisdictional memoranda filed in this case, the Court declined jurisdiction to hear the case. This unpublished opinion by the Chief Justice, Thomas J. Moyer, is reprinted in Appendix K.

JURISDICTION

The Judgment of the Tenth District Court of Appeals for the State of Ohio was entered on September 9, 2008. A timely Notice of Appeal and Memorandum in Support of Jurisdiction were filed with the Supreme Court of Ohio on October 24, 2008. Jurisdiction to the Supreme Court of Ohio was denied via the Court's Entry dated February 4, 2009. This Petition is timely filed according to Supreme Court Rules 13.1 and 13.3. The Court derives jurisdiction from 28 U.S.C. § 1257(a).

STATUTE INVOLVED

United State Code, *Title 20*, Chapter 33: Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.*

The relevant portions of the Individuals with Disabilities Education Act ("IDEA"), include:

Section 1415(a)—Any state educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

Section 1415(b)—The procedures required by this section shall include the following: (3) Written prior notice to the parents of the child, in accordance with subsection (c)(1) of this section, whenever the local educational agency—(A) proposes to initiate or change; or (B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

Section 1415(j)—Except as provided in subsection (k)(4) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents agree otherwise, the child shall remain in the then-current educational placement of the child...until all such proceedings have been completed.

Section 1415(E)(ii)—Procedural issues

In matters alleging a procedural violation, a hearing officer may find that child did not receive a free appropriate public education only if the procedural inadequacies—(I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits.

Section 1415(E)(iii)—Rule of construction

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

STATEMENT OF THE CASE

The Individuals with Disabilities Education Act ("IDEA") allows state and local educational agencies to receive federal funding to educate students with disabilities. 20 U.S.C. § 1400 *et seq*. The IDEA was enacted in order to ensure that all children with disabilities receive a "free appropriate public education" ("FAPE") which emphasizes special education and related services designed to meet unique needs, and further to protect the rights of children with disabilities and their parents. 20 U.S.C. § 1400(d)(1)(A), (B). In order for states to qualify for federal assistance under the IDEA, they must enact policies and procedures consistent with the IDEA requirements. 20 U.S.C. § 1412.[1]

In keeping with the remedial nature of the Act, the IDEA further provides for certain mandatory procedural safeguards which must be complied with by school districts. These safeguards are meant to ensure that the parents of a disabled child are afforded meaningful protection against a school district making unilateral decisions regarding a child's IEP and educational program. *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176 (1982) (the Act's procedural safeguards are for the protection of the disabled child and his parents). Among the many procedural

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[1] Ohio has enacted policies and procedures that are consistent with the IDEA which are codified in R.C. Chapter 3323. The Ohio State Board of Education has promulgated rules for the education of students with disabilities under the authority granted in R.C. 3323.03 and 3323.04. See generally, Ohio Adm. Code Chapter 3301-51.

safeguards found in the Act are the right of the parents to receive prior written notice when a school intends to implement a change to a child's IEP and the right to a review of the school's decision through a due process hearing and attendant appeals. 20 U.S.C. § 1415(b)(3), (f), (g); 34 CFR 300.503.; R.C. 3323.05 (C) and (E). The Act further seeks to protect the disabled child by requiring that once such a due process request is filed, the disabled child must continue to receive FAPE throughout the entire due process hearing (and other proceedings brought under the Act). *Verhoven v. Brunswick Sch. Comm.*, 207 F.3d 1 (1st Cir. 1999) (stay-put is the IEP for all proceedings under the ACT at both administrative and judicial levels). This right to continued FAPE through the maintenance of the "status quo" is supposed to be guaranteed through the "stay-put" provision. 20 U.S.C. § 1415(j). Stay-put is particularly important because actions brought pursuant to the IDEA can last for years.

This matter arose from The Worthington City School District's (the "District") violation of the IDEA. Petitioners Warren and Tammy Stancourt's (the "Stancourts" or "Parents") son, Gregory Stancourt ("Gregory"), classified as a "child with a disability under the IDEA, had been receiving special education services from the District. However, the District denied Gregory his rights under the Act when it unilaterally altered his IEP and failed to comply with the Act's mandatory procedural safeguards. Specifically, during an IEP meeting conducted on Wednesday, April 10, 2002, the District surprised the Stancourts with a pre-drafted IEP addendum that purported to phase out Gregory's behavior plan. When the Stancourts refused to sign the "phase out plan" until they had time to thoroughly review and consider

the addendum, the District misled them into believing that they would allow the parents to "read and digest" the proposed plan and reconvene the IEP meeting at a later date to formally address the matter. Taking the District at its word, the Parents informed the District that they would be available as soon as possible for another IEP meeting and then left the meeting with the intention of seeking Gregory's psychologist's input on the "phase out" plan. However, on Saturday, April 13, 2002, the District drafted a PS-401 notifying the Stancourts that the addendum ("April addendum") would be implemented on Monday, April 15, 2002. The Parents received this notice, by U.S. mail, on Wednesday April 17, 2002, two days *after* the IEP was implemented. The Parents never had an opportunity to prevent the addendum from being made part of Gregory's stay-put IEP because the addendum was implemented before the Parents were ever notified of the District's intention to implement the change. The Stancourts trusted the District to abide by its own agreement that the meeting would be reconvened after the Stancourts had read and digested the "phase out plan." The District, however, did not wait for another meeting as promised, and in fact, chose to immediately implement the April 10 addendum all the while knowing that the Parents would not receive the PS-401 until after the implementation was complete – thereby preventing the Stancourts from being able to stop the implementation by filing for due process first.

The District's improper implementation of the April addendum, which constituted a change in Gregory's IEP, blatantly violated the prior written notice requirement provided in the safeguards of the IDEA. *See* 20 U.S.C. § 1415 (B)(3)(A). Thus, the Stancourts initiated a dispute at the administrative level in

August of 2002.[2] Since 2002, the instant case has traveled through the exhaustive channels of administrative and state court review, which have ultimately led to the most recent disposition of the Tenth District Court of Appeals for the State of Ohio. The remaining issues that emerged from years of litigation and were decided upon by the Court of Appeals pertain to the questions of 1) whether the District engaged in a procedural violation of the IDEA constituting a denial of Gregory's right to FAPE and 2) whether or not the "stay-put" provision of the 20 U.S.C. § 1415 was invoked by the dispute regarding the April addendum.

The Court of Appeals affirmed the decision of the Franklin County Court of Common Pleas which held that 1) even if the District engaged in a procedural violation of the IDEA, such a violation resulted in no substantive harm to Gregory and therefore, was not actionable and 2) that the April addendum did not invoke the stay-put rule because it was not a change in educational placement. Under the Court of Appeals' ruling, a school district can always unilaterally change and implement a disabled child's IEP, and then later notify the child's parents. At that point, even if the parents immediately institute a grievance, the child will be held to the IEP already implemented by the

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[2] On May 28, 2002, the Stancourts met with the District to discuss Gregory's IEP for the 2002-2003 school year, to which the Stancourts did not consent. On May 31, 2002, the Stancourts requested an impartial due process hearing regarding the implementation of the April addendum and the proposed IEP for the 2002-2003 school year, but withdrew the request shortly thereafter. They renewed their due process request in August 2002.

district, which will remain in place during the pendency of lengthy litigation. This result is surely not what Congress intended when enacting the remedial statute aimed at protecting the rights of disabled children and their parents and which places such importance on procedural safeguards.

REASONS FOR GRANTING THE WRIT

Issues of public education are of great significance to all U.S. citizens. All children are entitled to receive a free public education despite level of income, intelligence, ability or disability. Congress designed the IDEA specifically to ensure that all children with disabilities received FAPE and to protect the rights of such children and their parents. 20 U.S.C. § 1400(d)(1)(B). "The core of the statute...is the cooperative process that it establishes between parents and schools." *Schaffer v. Weast,* 546 U.S. 49, 53 (2005), citing *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 205-206 (1982). "Parents and guardians play a significant role in the IEP process." Id. This court has recognized that "it is the natural duty of the parent to give his children education suitable to their situation in life." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). Thus, it is only appropriate that Congress, in enacting the IDEA, stressed that parental participation under the Act is vital to ensure that a child with a disability receives a free appropriate public education.

The practical implication of the holding of the Tenth District Court of Appeals is disconcerting as it essentially permits public schools to overlook the procedural requirements mandated by federal law which are in place to protect disabled children from

being denied FAPE. The decision also allows public schools to usurp parental involvement in a disabled child's educational plan despite the fact that the law directs the school *and the parents* to participate together in the child's educational process. Under the Court of Appeals decision, a school district will always be able to pick the services and educational program of a disabled child, by implementing the removal of certain services, prior to notifying the parents and before the parents have an opportunity to file for due process of the school's "proposal". This outcome certainly thwarts every procedural safeguard Congress intended to protect parents and disabled children who are in a position of unequal bargaining power with school districts.

I. THE DECISION OF THE COURT OF APPEALS WITH RESPECT TO THE DISTRICT'S PROCEDURAL VIOLATION IS NOT SUPPORTED BY THE INTENT AND SCOPE OF THE IDEA.

It goes without saying that courts of all jurisdictions recognize the importance of parental involvement in the IEP process, which happens to be a cornerstone of the IDEA. *See* e.g. *Rowley*, 458 U.S. 176; *Doe v. Alabama State Dept. of Educ.*, 915 F.2d 651, 660 (11th Cir. 1990) (stating "[i]t is beyond dispute that full parental involvement in the handicapped child's education is the purpose of many of the EHA's procedural requirements"; *Vogel v. School Board*, 491 F. Supp. 989 (W.D. MO 1980); *Cordrey v. R.J. Euckert*, 917 F.2d 1460 (stating "[a] school district must ensure that the parents of a handicapped child have full opportunity to participate in the IEP meeting); *Dima v. Macchiarola*, 513 F.Supp. 565 (D.C. N.Y. 1981).

Congress provided for mandatory procedural safeguards to ensure parental involvement in the education of children with disabilities. One of these safeguards includes a school's obligation to provide parents with *written prior notice* whenever it proposes or refuses to initiate or change identification, evaluation of educational placement of child, or provision of FAPE. 20 U.S.C. § 1415(b)(3).

This Court, in *Rowley* recognized the importance of the Act's procedural requirements specifically stating:

> [W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process..., as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parents throughout the development of the IEP...demonstrates the legislative conviction that adequate compliance with procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Rowley, 458 U.S. at 205-206. The Court of Appeals for the Fourth Circuit in *Hall v. Vance*, 774 F.2d 629 (4th Cir. 1985), further interpreted *Rowley* when it held,

> [u]nless schools apprise parents of their procedural protections, . . . parental

> participation will rarely amount to anything more than parental acquiescence, because parents will presume they have no real say, and the participatory function envisioned by *Rowley* will go unfulfilled.

Id. at 634. Thus, this begs the question, what happens when a school violates a procedural obligation under the IDEA? The Tenth District Court of Appeals relied on the Sixth Circuit decision in *Knable v. Bexley City School Dist.*, 238 F.3d 755 (6th Cir. 2001) for the proposition that relief may only be granted due to a procedural violation if the violation resulted in "substantive harm", thereby constituting a denial of FAPE. It applied a combined inquiry of procedure and substance to essentially determine that procedural violations mean nothing unless they cause provable harm. However, this Court in *Rowley* established that a court's inquiry in suits brought under the IDEA is a two-part test examining procedure and substance as separate issues. Under the first prong, it must be determined whether the school complied with the procedures set forth in the Act. The second prong inquires as to whether the student's IEP developed through the Act's procedures was reasonably calculated to enable the child to receive educational benefits. *Rowley* requires schools to comply with both obligations. *Rowley*, *supra* at 206.

The procedural violation at issue in the instant matter relates to the District's failure to properly provide the Stancourts with written prior notice of its intent to implement the April addendum, a change in Gregory's IEP. The Tenth District and Sixth Circuit in applying the "substantive harm" test strip the IDEA of enforcement of its procedural safeguards explicitly put

in place to protect a disabled child by providing for parental involvement in development and formulation of the child's IEP. *See Rowley, supra* at 3052. The current version of the Act, effective as of July 1, 2005, clarifies the ability of an aggrieved parent to obtain relief as a result of a procedural violation of the Act regardless of whether or not the violation causes "substantive harm".

Pursuant to 20 U.S.C. § 1415(E)(ii), claims involving a denial of FAPE as a result of a procedural violation can be found if the procedural inadequacy 1) impeded the child's right to a free appropriate public education; 2) significantly impeded the parents' opportunity to participate in the decision making process regarding of the provision of a free appropriate public education to the parents' child; or 3) caused a deprivation of educational benefits. Notably, this current version of the Act also specifically allows for *equitable relief* in the event a procedural violation is committed regardless whether or not denial of FAPE results. Specifically, 20 U.S.C. § 1415(E)(iii) states, "[n]othing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section." This current version explicitly elucidates the intent of the drafters to allow parents to sustain a cause of action for a procedural violation regardless of whether or not the violation caused "substantive harm" by allowing aggrieved parents to receive equitable relief even absent a showing of such harm. This is consistent with the ideals and objectives behind the Act and would

certainly deter schools from engaging in procedural violations of the Act.[3]

Pursuant to *Rowley* special emphasis is placed on strict adherence to the Act's procedures. *Rowley supra* at 205. Other circuits have heeded the law established by *Rowley* and two circuits have specifically held that a school's failure to comply with the procedural requirements of the IDEA constitutes a *per se* violation of the Act. *See Jackson v. Franklin County School Bd.*, 806 F.2d 623, 629 (5th Cir. 1986) ("failures to meet the Act's procedural requirements are 'adequate grounds by themselves' for holding that a school failed to provide a free and appropriate education as mandated by the Act); *Hall*, 774 F.2d at 635 (school failed to provide FAPE when it did not follow procedural requirements). Additionally, *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994) held the Act's written prior notice requirement "should be enforced rigorously". The opinions above are clearly at-odds with that of the Tenth District and the Sixth Circuit regarding procedural violations. Apparent differences between the courts' interpretation of when relief may be granted as a result of a procedural violation indicate a need for guidance on this issue. Although, the Sixth Circuit has espoused the "substantive harm" test, it seems to rely on both sides of the same coin when considering issues of procedural violations, as it has stated, "the IEP process *should be reviewed for strict procedural compliance*, although technical deviations would not make an IEP invalid."

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[3] Logic dictates that a procedural violation resulting in equitable relief would also entitle parent as the prevailing party to attorney's fees pursuant to Act.

N.L v. Knox County Schools, 315 F.3d 688, 692 (6th Cir. 2003) (emphasis added) citing *Burilovich v. Board of Educ.*, 208 F.3d 560, 566 (6th Cir. 2000) citing *Dong v. Board of Educ.*, 197 F. 3d 793, 800 (6th Cir. 1999). If strict procedural compliance is required, how can procedural violations that do not cause substantive harm, but are nonetheless violations, be deemed technical deviations which are ultimately ignored?

The impact of allowing courts to only grant relief for procedural violations of the Act upon a showing of substantive harm flies in the face of the procedural protections and runs contrary to the plain language of the Act as it stands today. In addition, this interpretation perverts the precedent set by this honorable Court in *Rowley*. Accordingly, the Court's examination and resolution of this issue is vital to the proper execution of the IDEA and assuring that the rights of disabled children and their parents are protected.

II. WHAT CONSTITUTES A CHANGE IN "EDUCATIONAL PLACEMENT" IS AN AMBIGOUS INQUIRY.

Under the Act's "stay-put" provision, when a challenge is made to a change in a child's placement, the child shall remain in the "current educational placement" during the pendency of the proceedings. 20 U.S.C. § 1415(j). The "stay-put" provision ensures that a school cannot "eject a child and change his placement without complying with due process." *Tennessee Dept. of Mental Health and Mental Retardation v. Paul B.*, 88 F. 3d 1466, 1472 (6th Cir. 1996). The efficacy of stay-put requires that the parent be provided written prior notice of a proposed change so that they may

temporarily enjoin the school from making the change until an impartial hearing officer determines whether the proposed IEP comports with the IDEA.[4] Congress enacted the stay-put provision of the IDEA in order to prevent a school district from "unilaterally implementing" a change in the child's educational program and to maintain the status quo. *Georgia Dept. of Ed v. Cherry*, 314 F.3d 545, 552 (11th Cir. 2002).

The objective behind the stay-put provision is to maintain stability and continuity for the child until the dispute is resolved. The phrase "educational placement," is not defined in the IDEA or the regulations interpreting the same. Thus, the courts have interpreted "current educational placement" for purposes of stay-put to mean the child's placement *before* the proposed change to the IEP or the last agreed upon IEP. *Spilsbury v. District of Columbia*, 307 F. Supp.2d 22 (D.C. Cir. 2004). Furthermore, "[i]n complying with the IDEA's stay-put provision, courts must interpret 'educational placement' to incorporate enough flexibility to encompass the child's experience." *John M. v. Board of Educ. of Evanston Tp. High School Dist.*, 502 F.3d 708, 714 (7th Cir. 2007).

What constituted Gregory's proper educational placement during the pendency of the dispute was a pivotal question with which the Court of Appeals was

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[4] As addressed in the previous section, the failure to provide such written prior notice is a procedural violation. In this case, such a procedural violation not only impeded the Stancourts' rights to participate in Gregory's IEP, but it also prevented them from filing for due process before the District made the unilateral change to Gregory's IEP.

faced. The Court of Appeals held that the application of stay-put was only implicated in situations involving a change in the child's placement. The Court stated that "[w]hile the stay-put requirement is implicated only by modifications to a student's educational placement, not every change to a student's IEP constitutes a change in educational placement." *Stancourt v. The Worthington City School Dist.*, Franklin App. Nos. 07-835, 07-836 (10th Dist. 2008), unreported, citing *Cavanagh v. Grasmick*, 75 F. Supp. 2d 446, 466 (D. Md. 1999). The Court went on to acknowledge that neither the IDEA nor the implementing regulations define "educational placement" or "change in placement", and that judicial construction has not provided definitive meaning of "educational placement". *Id.*

Various courts have been faced with the construction of the term "educational placement" which has been defined as "anything from 'the physical school attended by a child [to] the abstract goals of a child's IEP.'" *AW ex. rel Wilson v. Fairfax County School Bd.*, 372 F.3d 674, 679 (4th Cir. 2004) quoting *Bd. of Edn v. Ill. State Bd. of Edn.*, 103 F. 3d 545, 548 (7th Cir. 1996). Without defining educational placement, the Court of Appeals ultimately determined that whether a modification of a child's IEP constitutes a change in placement, triggering stay-put, is a fact-specific inquiry. *Stancourt supra.* Regardless of whether it is a factual inquiry, it is crucial to the proper application of the IDEA to make that finding based on a working definition of the essential term. When such a term is fundamental to the evaluation of a disabled child's rights under the IDEA, it cannot be so loosely defined. Without further guidance and definitive meaning of the term "educational

placement", districts will be permitted to manipulate the provision to ensure that they have sole power to determine a child's placement during the pendency of an IDEA-related dispute, which runs afoul to language, spirit and purpose of the Act.

III. CONCLUSION

The decision of the Tenth District Court of Appeals undermines the mandatory procedural safeguards of the IDEA. The decision also gives schools wide latitude to change a child's placement without being held to stay-put. The IDEA is a remedial statute designed to first and foremost protect the educational rights of disabled children and should be construed so as to give effect to those rights. *Collingsgru v. Palmyra Bd. of Edn*, 161 F.3d 225, 231 (3rd Cir. 1998). Without proper application of and adherence to the purpose of the Act, disabled children and their families will not receive the protection Congress intended them to receive. Instead, it is quite likely that these children will not receive proper education causing them to suffer a tremendous deficit. Lost education is a harm that the IDEA is meant to prevent. The IDEA must be interpreted in such a manner that furthers the spirit behind it. The Court of Appeals' holding dilutes the meaning and objectives of the statute, accordingly, Petitioners respectfully request the grant of this Petition for Writ of Certiorari to address these important issues of federal law.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE COURT OF APPEALS OF OHIO TENTH APPELLATE DISTRICT

No. 07AP-835
(C.P.C. No. 03CVF06-06746)

No. 07AP-836
(C.P.C. No. 03CVF11-12578)

(REGULAR CALENDAR)

[Filed September 9, 2008]

Warren and Tammy Stancourt, Parents of Gregory Stancourt,	)
Appellants-Appellants,	)
v.	)
The Worthington City School District,	)
Appellee-Appellee.	)

OPINION

Rendered on September 9, 2008

Stein, Chapin & Associates, LLC, and *Lance Chapin*, for appellants.

Cooper, Gentile & Washington Co., Janet K. Cooper, and *Beverly A. Meyer*, for appellee.

APPEALS from the
Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Appellants, Warren and Tammy Stancourt ("the Stancourts"), appeal from a judgment of the Franklin County Court of Common Pleas dismissing their administrative appeal under R.C. 3323.05, and remanding the matter to the State Board of Education for further proceedings. For the following reasons, we affirm.

{¶2} This matter arises out of a purported violation of the Individuals with Disabilities Education Act ("IDEA"), Section 1400 et seq., Title 20, U.S.Code by appellee, Worthington City School District Board of Education ("appellee"). The IDEA provides federal funding to assist state and local educational agencies in educating individuals with disabilities. *Austintown Local School Dist. Bd. of Edn. v. Mahoning Cty. Bd. of Mental Retardation & Dev. Disabilities* (1993), 66 Ohio St.3d 355, 360. As required to qualify for federal assistance, Ohio has enacted policies and procedures through R.C. Chapter 3323 that are consistent with the IDEA. Id. That chapter incorporates the purpose of the IDEA, i.e., "to provide handicapped children a free, appropriate public education tailored to the unique needs of each child by developing an IEP [individualized education program] which places the child in the least restrictive environment." Id. at 360, citing R.C. 3323.01(D) and (E), 3323.02, 3323.08(C) and Ohio Adm.Code 3301-51-02(E)(1)(d)(iv). The State

Board of Education has promulgated rules for the education of handicapped children under authority granted in R.C. 3323.03 and 3323.04. Id. See, generally, Ohio Adm.Code Chapter 3301-51.

{¶3} Having exhaustively detailed the facts underlying the parties' dispute in *Stancourt v. Worthington City School Dist. Bd. of Edn.*, 164 Ohio App.3d 184, 2005-Ohio-5702, we reiterate only those facts and procedural events relevant to this appeal.

{¶4} In January 2002, an IEP was created to address the educational needs of the Stancourts' son, Gregory, who was a fifth-grade student in the Worthington City School District. The Stancourts and appellee agreed to the January 2002 IEP, which established the following Annual Goals:

> 1.0 Gregory will read and write material at the fifth grade level.
>
> 2.0 Gregory will calculate and solve grade level math problems using addition, subtraction, multiplication and division.
>
> 3.0 Gregory will remain on task during assigned work times.
>
> 4.0 Gregory will follow the general rules expected of all students regarding his physical behavior based upon each environment[']s specific rules.

With respect to each Annual Goal, the IEP identified several objectives.

{¶5} The January 2002 IEP also contained a behavior plan. The behavior plan identified five targeted behaviors, mirroring objectives listed under Annual Goals 3.0 and 4.0, as follow:

> 1. complete and turn in assignments within the allotted time
>
> 2. will not touch others by keeping his hands & feet to himself
>
> 3. work will be completed neatly (legibly and without doodling)
>
> 4. increased duration of time on task
>
> 5. work without vocalizations[.]

The behavior plan established a point system, under which Gregory earned one point for each targeted behavior he demonstrated during each of eight instructional periods per school day. The behavior plan also provided for response costs, including loss of points or time-out periods, should Gregory not demonstrate a targeted behavior. Gregory earned identified privileges or rewards upon earning a specified percentage of the total available points in a week. Initially, Gregory earned a privilege or reward if he earned 60 percent of the available points in a week. After Gregory earned 60 percent of the available points for two consecutive weeks, the percentage of points required to earn a privilege or reward increased to 70 percent. Once Gregory earned 70 percent of the available points for two consecutive weeks, the percentage of points required to earn a privilege or reward increased to 80 percent. The behavior plan also

required that "Gregory will be verbally or nonverbally reinforced by the teacher (approximately every 5-10 minutes) until he achieves the identified target percentage of points * * * for a week. When he achieves the identified target percentage for a week, he will then be verbally reinforced intermittently * * * for the remaining weeks." The behavior plan provided that, if Gregory earned 80 percent of the available points for two consecutive weeks, the targeted behaviors would be considered mastered, and "the IEP team will be reconvened to discuss fading of reinforcers."

{¶6} During the remainder of the 2001-2002 school year, three addenda were added to Gregory's IEP. The Stancourts agreed with the first two addenda, but did not agree with the third, dated April 10, 2002. The parties' dispute revolves around the April 10, 2002 addendum, which called for thinning the reinforcers described in the behavior plan by gradually reducing the number of points available to Gregory, reducing the frequency of reinforcers for performance of targeted behaviors, and eventually eliminating the behavior plan. The addendum expressly provided that, "[i]f Gregory does not maintain the target behaviors with intermittent reinforcement during the remainder of the year or during the first 4 weeks of school year 02-03, the behavior plan on the IEP dated 1/22/02 will be reinstated." Appellee proposed the April 10, 2002 addendum because Gregory had earned 80 percent of the total points available under the behavior plan for two consecutive weeks and had, therefore, mastered the targeted behaviors. School officials met with the Stancourts and presented them with the addendum on April 10, 2002, but the Stancourts refused to sign it, instead requesting additional time to read, consider, and discuss it with Gregory's psychologist.

{¶7} On Saturday, April 13, 2002, appellee issued a Written Notice to Parents, notifying the Stancourts that the April 10, 2002 addendum would take effect on Monday, April 15, 2002, and informing them of procedural safeguards available under the IDEA. The Stancourts claim that they received the written notice on April 17, 2002, two days after the effective date of the addendum.

{¶8} On May 28, 2002, the Stancourts met with school officials to discuss Gregory's IEP for the 2002-2003 academic year. Although appellee presented the Stancourts with a proposed IEP, dated June 7, 2002, the Stancourts did not consent to that IEP, and it was not implemented.

{¶9} On May 31, 2002, the Stancourts requested an impartial due process hearing regarding implementation of the April 10, 2002 addendum and the proposed 2002-2003 IEP, but they withdrew that request shortly thereafter. On August 26, 2002, the Stancourts renewed their request for an impartial due process hearing based on "the addendum, dated April 10, which [appellee] implemented without our consent or participation and the new IEP which has been drafted and which eliminates all reference to social skills needs. Also, the lack of a social skills goal and objectives in the current IEP." The Stancourts' request was referred to an impartial hearing officer ("IHO").

{¶10} Under the IDEA, during the pendency of an impartial due process hearing or any subsequent appeal, a child must remain in his or her "then-current educational placement." Former Section 1415(j), Title 20, U.S. Code, Pub. L. No. 105-17, 111 Stat. 37, 93. See, also, former Section 300.514(a), Title 34, C.F.R.,

64 F.R. 12406, 12452 ("[e]xcept as provided in § 300.526, during the pendency of any administrative or judicial proceeding regarding a complaint under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement"). Likewise, former Ohio Adm. Code 3301-51-02(G)(6)(a), effective February 28, 1997, provided that, unless the parent and the school district agreed otherwise, a child was to remain in his or her current educational placement during the pendency of any impartial due process hearing or subsequent appeals. The IDEA's stay-put provision "is premised on the rationale that preservation of the status quo, rather than an inappropriate reaction to an emergent situation, provides for the best interests of the child," and it "guarantees consistency in a child's learning environment until a challenge to an existing placement or a new placement has successfully established whether a different alternative placement is necessary." *Tenn. Dept. of Mental Health & Mental Retardation v. Paul B.* (C.A.6, 1996), 88 F.3d 1466, 1472.

{¶11} On October 2, 2002, the IHO issued a decision regarding Gregory's stay-put placement. The IHO cited cases emphasizing the right of the child to "remain in his or her then current educational placement in the event of a due process request" and stated that, under the Ohio Administrative Code, "if a disputed IEP proposes to change program placement on the continuum of potential placements, then the last agreed-upon IEP is the 'stay-put' placement, but if the dispute involves the provision of services only, then the disputed IEP can be the 'stay-put' placement provided the school district has implemented the

change pursuant to a PS-401 Prior Written Notice Form." (Emphasis sic.) Suggesting that the April 10, 2002 addendum did not change Gregory's educational placement, the IHO found that Gregory's stay-put placement included all three addenda to the January 2002 IEP.

{¶12} On February 13, 2003, the IHO dismissed the Stancourts' due process proceedings with prejudice based on the Stancourts' failure to comply with the IHO's order to release Gregory's medical and mental health treatment records to appellee. The Stancourts appealed to the State Board of Education, which appointed a state-level reviewing officer ("SLRO") to consider the appeal. In a final decision and entry mailed May 12, 2003, the SLRO amended the IHO's order to a dismissal without prejudice, subject to reopening if the Stancourts complied with the IHO's order to grant appellee access to Gregory's records. The SLRO did not address Gregory's stay-put placement.

{¶13} The Stancourts appealed to the Franklin County Court of Common Pleas, which, on July 27, 2004, issued a judgment, reversing the IHO and SLRO dismissals, but affirming the IHO's determination that the April 10, 2002 addendum was part of Gregory's stay-put placement. The Stancourts appealed to this court and, in *Stancourt*, argued that the trial court erred in finding that the April 10, 2002 addendum was part of Gregory's stay-put placement. *Stancourt* also involved a cross-appeal by appellee from the trial court's determination that the SLRO lacked authority to dismiss the Stancourts' due process request based on their failure to comply with the IHO's discovery order.

{¶14} In *Stancourt*, this court affirmed the trial court's judgment reversing the dismissals of the Stancourts' due process proceedings. However, we held that the trial court erred in finding that the April 10, 2002 addendum was part of Gregory's stay-put placement based on the court's failure to "make the requisite finding whether the change reflected in the addendum of April 10, 2002, implicated a detrimental change in the elements of [Gregory's] IEP, or * * * fundamentally changed or eliminated a basic element of [Gregory's] IEP, thereby implicating the 'stay put' provision of Section 1415(j), Title 20, U.S.Code." *Stancourt* at ¶68. Therefore, we remanded for the trial court to make that determination. We also directed the trial court to consider whether appellee deviated from the procedural requirements of the IDEA and, if so, whether the deviation resulted in substantive harm.

{¶15} On remand, the trial court referred the matter for an evidentiary hearing before a magistrate, who considered expert testimony from William A. Lybarger, Ph.D., on behalf of the Stancourts, and Kevin Arnold, Ph.D., on behalf of appellee, documentary evidence submitted by both parties, the administrative record, and the arguments of counsel. The magistrate issued a decision on March 20, 2007, containing findings of fact and conclusions of law. The magistrate found that the April 10, 2002 addendum neither implicated a detrimental or fundamental change to Gregory's IEP nor eliminated a basic element of the IEP. Because the magistrate found that the addendum did not represent a fundamental change in Gregory's identification, evaluation or educational placement, he concluded that it did not implicate the stay-put provision of Section 1415, Title 20, U.S.Code and that the maintenance of Gregory's current

educational placement would not prohibit the modifications set forth in the April 10, 2002 addendum. The magistrate further determined that any procedural violation of the IDEA based on the timing of notice to the Stancourts did not result in substantive harm and, thus, did not warrant further action. Over the Stancourts' objections, the trial court adopted the magistrate's decision on July 26, 2007, and entered final judgment, dismissing the Stancourts' appeal, on September 13, 2007.

{¶16} The Stancourts filed a timely notice of appeal and here, in their second appeal to this court, they assert a single assignment of error:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT GREGORY STANCOURT WAS NOT HARMED BY THE ACTION OF WORTHINGTON CITY SCHOOLS.

Under their assignment of error, the Stancourts argue that the trial court erred in holding that Gregory did not suffer substantive harm as a result of appellee's unilateral implementation of the April 10, 2002 addendum to his IEP without prior notice to the Stancourts. They further assert that the trial court erred in holding that Gregory did not suffer harm because the only expert testimony on that issue was to the contrary. Lastly, the Stancourts maintain that the trial court should have excluded Dr. Arnold's testimony regarding opinions formulated during unauthorized evaluations and observations of Gregory.

{¶17} As in *Stancourt*, we apply a hybrid standard of review. We review the trial court's findings of fact

under a clearly erroneous standard, accepting those findings that are based upon some competent, credible evidence, but we review the trial court's conclusions of law de novo. Id. at ¶47, citing *Knable v. Bexley City School Dist.* (C.A.6, 2001), 238 F.3d 755, and *Cremeans v. Fairland Local School Dist. Bd. of Edn.* (1993), 91 Ohio App.3d 668.

{¶18} We first address the Stancourts' argument regarding the trial court's consideration of Dr. Arnold's testimony. Although the Stancourts' counsel initially objected to any testimony from Dr. Arnold based upon observations, testing, and events occurring after October 15, 2001, the date of Dr. Arnold's report, their argument in their appellate brief concerns only testimony regarding Dr. Arnold's involvement after implementation of the January 2002 IEP. The Stancourts argue that the magistrate should have stricken Dr. Arnold's testimony because it was procured through unauthorized interactions, observations, and evaluations. Although the Stancourts undisputedly authorized Dr. Arnold to assist in the development and implementation of Gregory's IEP by conducting a consultative psychological evaluation of Gregory, they contend that Dr. Arnold's authority to observe, assess or examine their son terminated once the initial assessment was complete, and any further action was without their consent and in violation of Section 1414(c)(3), Title 20, U.S.Code. To the contrary, appellee maintains that the Stancourts repeatedly authorized Dr. Arnold to evaluate Gregory, that all of Dr. Arnold's actions were within such parental consent, and that the Stancourts, despite knowledge of Dr. Arnold's continuing evaluation of Gregory's educational program, never

revoked their consent or otherwise objected to Dr. Arnold's involvement.

{¶19} Generally, the admission or exclusion of evidence is within the trial court's broad discretion, and an appellate court will not reverse a trial court's decision to admit evidence absent an abuse of discretion. *State ex rel. Sartini v. Yost*, 96 Ohio St.3d 37, 2002-Ohio-3317, ¶21. Here, the trial court rejected the Stancourts' arguments and considered Dr. Arnold's testimony in its entirety. In addition to stating that Section 1414, Title 20, U.S.Code "does not address any continuing evaluation or the effect of a lack of consent on materials reviewed for litigation," the magistrate noted that Dr. Arnold would be entitled to review and evaluate any materials and records examined and relied upon by the Stancourts' expert, Dr. Lybarger. Further, the magistrate found that, despite knowledge of Dr. Arnold's continuing involvement regarding Gregory's IEP, the Stancourts did not object to Dr. Arnold's participation. Given that the vast majority of Dr. Arnold's testimony was based on his authorized evaluation of Gregory, his October 15, 2001 report, his involvement in the development of the January 2002 IEP, or on documents reviewed by Dr. Lybarger, coupled with the fact that the Stancourts did not object to Dr. Arnold's continued involvement in the IEP process, we find that the trial court did not abuse its discretion in considering Dr. Arnold's testimony in its entirety.

{¶20} We now turn to the Stancourts' substantive arguments. Although the Stancourts frame their assignment of error in terms of harm to Gregory, they also argue that the change reflected in the April 10, 2002 addendum fundamentally changed or eliminated

a basic element of Gregory's IEP, thereby implicating the stay-put provision of the IDEA. Appellee, on the other hand, argues that competent, credible evidence supports the trial court's findings, upon which the court concluded that the April 10, 2002 addendum did not implicate the stay-put provision. Because of its primary importance to this appeal, we address the issue of whether the April 10, 2002 addendum constituted a change in Gregory's educational placement before addressing the Stancourts' specific arguments regarding harm.

{¶21} The stay-put provision requires that a student must remain in his or her current educational placement during the pendency of an impartial due process hearing and subsequent appeals unless the school and the student's parents agree otherwise. See former Section 1415(j), Title 20, U.S.Code; Former Ohio Adm.Code Section 3301-51-02(G)(6)(a). The United States Supreme Court has noted that the purpose of the stay-put provision is "to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school" (emphasis sic), *Honig v. Doe* (1988), 484 U.S. 305, 323, and "to prevent school officials from *removing a child from the regular public school classroom* over the parents' objection pending completion of the review proceedings." (Emphasis added.) *School Commt. of Town of Burlington, Mass. v. Dept. of Edn.* (1985), 471 U.S. 359, 373. "Congress was concerned about the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes." Id.

{¶22} Given the purpose of the stay-put rule to protect children from unilateral displacement by school authorities, situations in which courts have found changes in educational placement, implicating the stay-put rule, include the following: expulsions for indefinite periods of time, *Honig*; graduation, *Cronin v. Bd. of Edn. of E. Ramapo Cent. School Dist.* (S.D.N.Y.1988), 689 F.Supp. 197; removal of a student from a classroom to home-based tutoring, *Lamont X v. Quisenberry* (S.D.Ohio, 1984), 606 F.Supp. 809; transfer of students from a residential facility to a "mainstream" program some 200 miles away, *Brimmer v. Traverse City Area Pub. Schools* (W.D.Mich.1994), 872 F.Supp. 447; transfer of students from a 12-month day treatment program to a 180-day alternative school program, *Tilton by Richards v. Jefferson Cty. Bd. of Edn.* (C.A.6, 1983), 705 F.2d 800, 804.

{¶23} Unlike cases involving a change to the type of educational program afforded a student, this case falls within the class of cases invoking application of the stay-put rule for adjustments to special educational services provided to an individual student. *Stancourt* at ¶50. While the stay-put requirement is implicated only by modifications to a student's educational placement, not every change to a student's IEP constitutes a change in educational placement. See *Cavanagh v. Grasmick* (D.Md.1999), 75 F.Supp.2d 446, 466 ("[i]f * * * [the modifications to the student's IEP] * * * did not affect the educational placement of the child, then the * * * 'stay-put' provision is inapplicable"). The focus should be on the importance of the particular modification and whether it is likely to significantly affect the child's learning experience. *DeLeon v. Susquehanna Community School Dist.* (C.A.3, 1984), 747 F.2d 149, 153.

{¶24} Neither the IDEA nor the implementing regulations define "educational placement" or "change in placement." While federal courts have frequently been called upon to determine whether a modification to a student's educational program constitutes a "change in placement" implicating the stay-put requirement, judicial construction has not provided a definitive meaning of "educational placement." Rather, in various contexts, courts have defined "educational placement" as referring to "anything from 'the physical school attended by a child [to] the abstract goals of a child's IEP.'" *AW ex rel. Wilson v. Fairfax Cty. School Bd.* (C.A.4, 2004), 372 F.3d 674, 679, quoting *Bd. of Edn. v. Ill. State Bd. of Edn.* (C.A.7, 1996), 103 F.3d 545, 548-549 (collecting cases). Whether a modification to a student's IEP constitutes a change in placement, triggering procedural protections under the IDEA, is necessarily a fact-specific inquiry. *Brimmer* at 452, citing *DeLeon* at 153.

{¶25} In *Stancourt*, citing cases holding that a student's educational placement is not changed unless there has been a fundamental change in, or elimination of, a basic element of the student's educational program, we essentially remanded this matter for a determination of whether the April 10, 2002 addendum constituted a change to Gregory's educational placement. See *Sherri A.D. v. Kirby* (C.A.5, 1992), 975 F.2d 193, 206; *Cavanagh* at 467-468. Although this court also quoted the Sixth Circuit's statement in *Paul B.*, at 1474, that "one must identify a detrimental change in the elements of an educational program in order for a chance to qualify for the 'stay put' provision," that case neither eliminates the requirement of a change in educational placement to implicate the stay-put provision nor alters the

determination of whether a change in educational placement has occurred. Thus, this court stated, at ¶55, that, "for a chance to qualify for the 'stay put' provision, the issue is reduced to whether the addendum of April 10, 2002, constituted a fundamental change in, or elimination of, a basic element of [Gregory's] educational program."

{¶26} On remand, the magistrate concluded that the alteration of behavioral reinforcement contemplated by the April 10, 2002 addendum was neither a fundamental change in nor an elimination of a basic element of Gregory's IEP and, therefore, did not reflect a change in Gregory's educational placement that would implicate the stay-put provision. In so concluding, the magistrate concurred with Dr. Arnold's expert testimony.

{¶27} Appellee retained Dr. Arnold in 2001 to evaluate Gregory regarding his academic performance and behavioral issues and to consult on the development of Gregory's IEP. There is no dispute that the Stancourts consented to Dr. Arnold's initial evaluation of Gregory and his involvement in the formulation of Gregory's January 2002 IEP. Dr. Arnold issued his report on October 15, 2001, after which he met with the Stancourts and school officials to review his report and recommendations. Dr. Arnold recommended that Gregory's IEP include social and behavioral goals to affect behaviors that appeared to impact Gregory's ability to benefit from his educational program. In particular, Dr. Arnold recommended including in Gregory's IEP a behavior plan, similar to that ultimately contained in the January 2002 IEP, as a means of implementing various aspects of the social and behavioral goals. Dr. Arnold's recommendation

called for a plan that would, initially, provide consistent reinforcers followed by a thinning of reinforcers to a variable schedule upon Gregory's mastery of the targeted behaviors. Dr. Arnold testified that, without a thinning component, the effectiveness of the plan would be lessened. The contemplation of thinning reinforcers is evident in the behavior plan attached to the January 2002 IEP, which provides that once Gregory mastered the targeted behaviors by earning 80 percent of available points for two consecutive weeks, "the IEP team will be reconvened to discuss fading of reinforcers." Dr. Arnold testified that the behavior plan was designed to permit reinstitution of reinforcers after thinning, if necessary for Gregory to maintain mastery of the targeted behaviors.

{¶28} With respect to the primary issue before the trial court on remand, Dr. Arnold opined that the April 10, 2002 addendum did not represent a change to Gregory's IEP, but merely documented a set of specific procedures to implement the thinning component contemplated in the behavior plan. Specifically, Dr. Arnold testified, as follows:

> * * * [A]s far as did it change the behavior plan? No. It implemented the behavior plan. The behavior plan had in fact a component within it, as any good behavior plan would, for a reduction in the delivery of the rewards and other components of the program and eventually the cessation of the program when behaviors had been mastered and then maintained. To suggest that the behavior plan was changed by implementing that component is inconsistent with what in my opinion behavioral

> psychologists would consider to be a change in the plan.

(Nov. 16, 2006 Tr. 88-89.) Dr. Arnold noted that the April 10, 2002 addendum expressly provided for full reinstitution of the behavior plan if the targeted behaviors did not persist after the thinning and eventual cessation of reinforcers. Dr. Arnold also disagreed with Dr. Lybarger's opinion that Gregory was harmed by the removal of the behavior plan from his IEP, stating: "Based on the data that I collected and at the time of my involvement I would not have agreed with this statement." (Nov. 16, 2006 Tr. 99.)

{¶29} The magistrate also considered the video deposition testimony of Dr. Lybarger, upon which the Stancourts rely in support of their assignment of error. Unlike Dr. Arnold, Dr. Lybarger had no direct contact with the Stancourts or Gregory, was not involved in the formulation of Gregory's IEP, and based his opinions solely on a review of records, including select school records and psychological reports. Dr. Lybarger opined that the change reflected in the April 10, 2002 addendum constituted a detrimental change to, and fundamentally changed or eliminated a basic element of, Gregory's January 2002 IEP. Specifically, Dr. Lybarger opined that the behavior plan was a fundamental element of Gregory's IEP and that Gregory was harmed "'by the cumulative effect of academic and social failure created by the removal of the Behavioral Plan from his stay-put IEP.'" (Lybarger Depo. 19.)

{¶30} The Stancourts argue that the trial court erred as a matter of law by finding that Gregory was not harmed by implementation of the April 10, 2002

addendum because Dr. Lybarger's testimony was the only evidence on that issue. We reject that argument. First, even had appellee not presented specific evidence contradicting Dr. Lybarger's opinion, the magistrate was not obligated to credit Dr. Lybarger's testimony on that issue. See *State v. Waugh*, Franklin App. No. 07AP-619, 2008-Ohio-2289, quoting *Croft v. State Farm Mut. Auto. Ins. Co.* (Jan. 8, 2002), Allen App. No. 1-01-72 ("'even where expert testimony is not directly controverted by the opposing party's evidence, the jury is not required to accept the testimony so long as the record contains objectively discernible reasons upon which the jury could rely to reject the expert's opinion testimony'"); *Suato v. Nacht* (Apr. 16, 1998), Cuyahoga App. No. 73118 ("[t]hat evidence is uncontroverted does not necessarily require the trier of fact to accept an argument advanced by a party"). Here, as the trier of fact, the magistrate was free to believe or disbelieve any witness, including an expert witness. *Clemens v. Gilbert*, Belmont App. No. 06 BE 57, 2007-Ohio-6072, ¶24. "'Once properly before the court, the expert's conclusions became a matter for the trier of fact.'" Id., quoting *State v. Hartman*, 93 Ohio St.3d 274, 285, 2001-Ohio-1580.

{¶31} Rather than accepting Dr. Lybarger's opinion, the magistrate concurred with Dr. Arnold's opinion that the tentative change in behavior reinforcement occasioned by the April 10, 2002 addendum was not a fundamental change, nor an elimination of a basic element, of Gregory's educational program. We discern no error in that determination. Dr. Lybarger admitted in his deposition that he had no knowledge of Gregory's behavior at the time the April 10, 2002 addendum was implemented. Rather, his knowledge of Gregory's behavior in 2002

was limited to what was described in the January 2002 IEP, prior to implementation of the behavior plan. Dr. Lybarger also mistakenly and repeatedly testified that the behavior plan attached to the January 2002 IEP was never implemented, although he also testified that his opinion would be the same whether the plan was implemented and then eliminated or was never implemented at all.

{¶32} We further find no error in the magistrate's rejection of Dr. Lybarger's reliance on evidence of Gregory's performance in subsequent school years for purposes of determining Gregory's stay-put placement. Although Dr. Lybarger described documents purportedly evidencing academic and behavioral failure, those documents were dated May 2003 and later. In essence, then, Dr. Lybarger based his opinion that Gregory was harmed by implementation of the April 10, 2002 addendum on educational records created over a year after implementation of that addendum and over six months after the IHO made her determination of Gregory's stay-put placement. While perhaps relevant to the merits of the Stancourts' due process hearing, such evidence is not relevant to the determination of Gregory's stay-put placement.

{¶33} As the magistrate aptly recognized, thinning of reinforcers was clearly contemplated under the original January 2002 IEP, and this thinning, coupled with a provision for reinstatement of consistent reinforcement should Gregory's mastery of the targeted behaviors lapse, did not rise to the level of a change in educational placement. The modifications to Gregory's educational program contemplated by the April 10, 2002 addendum did not change Gregory's placement on the continuum of alternative placements,

did not alter Gregory's opportunities to participate in academic, non-academic or extra-curricular activities, and did not affect the extent of Gregory's education with non-disabled students. See *Cavanagh*. Nor did the April 10, 2002 addendum revise the goals or objectives set forth in Gregory's January 2002 IEP. We cannot say that the tentative change contemplated by the April 10, 2002 addendum would substantially or materially alter Gregory's educational program. Accordingly, we find no error in the trial court's conclusion that the April 10, 2002 addendum to Gregory's IEP did not constitute a change in Gregory's educational placement and, therefore, did not implicate the stay-put provision.

{¶34} We also find that the record contains competent, credible evidence upon which the trial court could have concluded that implementation of the April 10, 2002 addendum did not constitute a detrimental change to Gregory's IEP. Dr. Arnold not only testified that implementation of the April 10, 2002 addendum did not constitute a change to Gregory's IEP, but he also disagreed with Dr. Lybarger's opinion that thinning of reinforcers caused harm. Here, the records evidenced appellee's belief in April 2002 that Gregory had mastered the targeted behaviors listed in the behavior plan. Because of his lack of knowledge of Gregory's behavior from April 2002 through May 2003, Dr. Lybarger was unable to contest the reasonableness of appellee's belief that Gregory had mastered those targeted behaviors. Moreover, there is no evidence in the record that Gregory's mastery of the targeted behaviors lapsed during the thinning process. To the contrary, Dr. Arnold's testimony indicates that Gregory maintained mastery of the targeted behaviors, and that, as of

November 2002, he was not inclined to reinstate the behavior plan. The trial court found that Gregory's educational records do not present evidence of any detrimental effect of the thinning of reinforcers in the year following implementation of the April 10, 2002 addendum. We find that the record contains competent, credible evidence in support of the magistrate's findings and find no error in the trial court's conclusion that the April 10, 2002 addendum did not reflect a detrimental change to Gregory's IEP.

{¶35} Lastly, in *Stancourt*, we directed the trial court to determine whether appellee's notice to the Stancourts regarding implementation of the April 10, 2002 addendum comported with the procedural requirements of the IDEA and, if not, to determine whether the deviation resulted in substantive harm. See *Knable* at 764 (only if a procedural violation of the IDEA has resulted in substantive harm, thereby constituting a denial of a free appropriate public education, may relief be granted); *Dong v. Bd. of Edn. of Rochester Community Schools* (C.A.6, 1999), 197 F.3d 793, 801 ("[w]hile we strictly review an IEP for procedural compliance, technical deviations do not render an IEP invalid"). On remand, the magistrate concluded that, even assuming a procedural violation of the IDEA based on the timing of appellee's notice to the Stancourts, no substantive harm resulted from that violation.

{¶36} In *Knable*, the Sixth Circuit stated that substantive harm occurs when a procedural violation of the IDEA seriously infringes upon the parents' opportunity to participate in the IEP process. Here, we find that the Stancourts were not precluded from meaningful participation in the IEP process. The

Stancourts participated in the creation of their son's IEP, including the behavior plan, which provided that, upon mastery of the targeted behaviors, the IEP team would meet to discuss thinning reinforcers as a necessary element of the behavior plan. The Stancourts met with school officials on April 10, 2002, and were presented with the April 10, 2002 addendum. Thus, the Stancourts were well aware of appellee's desire to proceed with thinning of reinforcers and, upon Gregory's successful maintenance of the targeted behaviors, cessation of the behavior plan. Despite receipt of appellee's written notice that the addendum had actually been implemented, and notice of the procedural safeguards available to them, two days after its effective date, the Stancourts waited nearly six weeks to request a due process hearing and then, almost immediately, withdrew their initial request. Appellants did not renew their request for a due process hearing until August 2002. Despite their disagreement with the April 10, 2002 addendum, the Stancourts continued their participation in the IEP process when they met, albeit unsuccessfully, with school officials regarding an IEP for the 2002-2003 school year. The Stancourts were involved in each step of the development and implementation of Gregory's IEP. That they disagreed with implementation of the April 10, 2002 addendum does not equate to a finding of substantive harm.

{¶37} In concluding that Gregory suffered no substantive harm as a result of the Stancourts' receipt of written notice two days after the effective date of the April 10, 2002 addendum, the magistrate looked to the language of the addendum itself, and its express safeguard against harm, in that if Gregory did not maintain mastery of the targeted behaviors, the

original behavior plan would be reinstated. The magistrate stated: "If the individuals involved in the hands on regimen of [Gregory's] schooling determined that he had reached the stage to alter his behavioral reinforcement plan, and if it did not achieve its goals after four weeks, the prior plan would be reinstituted, the latitude to do so should rest with the school." (Magistrate Decision at 25.) The magistrate noted that Gregory showed a substantial degree of success during his sixth-grade year, after implementation of the April 10, 2002 addendum, and found that the evidence of his poor grades in several subjects during succeeding years did not adequately attribute those grades to the thinning of behavioral reinforcers. As such, we conclude that competent, credible evidence supports the magistrate's finding that, even had appellee violated the procedural requirements of the IDEA requiring prior notice, no substantive harm resulted from such a violation.

{¶38} For the foregoing reasons, we overrule the Stancourts' assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and SADLER, JJ., concur.

APPENDIX B

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Case Nos. 03CVF06-6746
& 03CVF11-12578

[Filed July 26, 2007]

WARREN STANCOURT, et al.,	)
	)
Appellants,	)
	)
v.	)
	)
WORTHINGTON CITY SCHOOL DISTRICT BOARD OF EDUCATION,	)
	)
Appellee.	)
	)

Judge Schneider

DECISION AND ENTRY
(1) ADOPTING THE MAGISTRATE'S DECISION, FILED JUNE 28, 2007;
(2) ADOPTING THE MAGISTRATE'S DECISION, FILED MAY 15, 2007;
(3) DENYING APPELLANTS' OBJECTIONS TO THE MAGISTRATE'S MARCH 20, 2007 DECISION, FILED APRIL 3, 2007; AND

(4) ADOPTING THE MAGISTRATE'S DECISION, FILED MARCH 20, 2007
(Case Terminated)

Rendered this 24 day of July, 2007.

Schneider, C. J.

I. Magistrate's Decisions

A court may refer a case to a magistrate (formerly referee) under Civ. R. 53(C). A court considers a magistrate's decision as follows:

> It has been held that a referee's report must:
> "* * * [C]ontain a statement of facts forming the basis for the referee's recommendation to the trial judge. Absent such a statement, the court cannot adopt the recommendation because it lacks the necessary information to make the required independent analysis of the case." Nolte v. Nolte (1978), 60 Ohio App.2d 227 . . ., paragraph one of the syllabus.
>
> Referees serve in an advisory capacity and have no authority to enter final judgment. The court need not accept the report of the referee but may "* * * adopt, reject or modify the report; hear additional evidence; return the report to the referee with instructions; or hear the matter itself." Civ. R. 53(E)(2). Furthermore, the court may request that the report be supplemented with a transcript of proceedings and any evidence admitted if it so desires. Civ.R. 53(E)(1). To comply with Civ.R. 53, a referee's report must refer to facts contained in the record that support the conclusion and

> recommendation of the referee. Conn Constr. Co. v. Dept. of Transp. (1983), 14 Ohio App.3d 90 . . . .

State ex rel. Bedard v. Village of Lockbourne (Franklin 1990), 69 Ohio App. 3d 452, 459 (brackets in original).

Also, "[i]t is well established that a referee may determine, as trier of fact, the credibility of the witnesses and relative weight to be given their testimony." Chaney v. East (Cuyahoga 1994), 97 Ohio App. 3d 431, 437 (citing Conn Constr. Co., 14 Ohio App. 3d at 95); see Ciotola v. Fiocca (Franklin C.P. 1997), 86 Ohio Misc. 2d 24, 36 ("the magistrate, as the trier of fact, is in the best position to weigh the evidence presented, assess the credibility of the witnesses, and make an informed factual determination therefrom") (citing Seasons Coal Co. v. Cleveland (1984), 10 Ohio St. 3d 77); see also Bank One, Akron N.A. v. Atwater Ent., Inc. (Portage 1996), 115 Ohio App. 3d 461, 469; In re. Miller (Franklin App., Jan. 27, 1998), No. 97APF06-853, 1998 Ohio App. LEXIS 246; Pritchett, Dlusky & Saxe v. Pinque (Franklin App., Sept. 16, 1997), No. 96APE11-1598, 1997 Ohio App. LEXIS 4202.

In addition, any objections must be filed within fourteen days of a Magistrate's decision. Civ. R. 53(E)(3)(a); Loc. R. 99.05; see State ex rel. Wilson v. Industrial Comm'n of Ohio (2003), 100 Ohio St. 3d 23, 24 (per curiam). Also, Civ. R. 53(E)(3)(b) requires that "[a]ny objection to a finding of fact shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or an affidavit of that evidence if a transcript is not available." See H.L.S. Bonding Co. v. Fox (Franklin App., Feb. 3, 2004), No.

03AP-150, 2004 Ohio App. LEXIS 360, at *6 ["[T]he burden for providing a transcript or affidavit is upon the objecting party. Walther v. Newsome, Portage App. No. 2002-P-0019, 2003 Ohio 4723, at P20. The 'failure to provide an acceptable record to the trial court allows the trial court to disregard any objections to factual matters which have been challenged.' Roblyn M. v. Robert C. (Nov. 16, 2001), Wood App. No. WD-01-029, 2001 Ohio App. LEXIS 5110. Further, it precludes a party from asserting on appeal factual determinations. Walther, supra, citing Yancey v. Haehn (Mar. 3, 2000), Geauga App. No. 99-G-2210, 2000 Ohio App. LEXIS 786.").

II. Discussion of Magistrate's Decision on Exhibits

The Magistrate's decision on admitting and considering exhibits was filed May 15, 2007. The Magistrate's decision on admitting and considering exhibits and final recommendation was filed June 28.

Any objections must be filed within fourteen days of a Magistrate's decision. Civ. R. 53(E)(3)(a); Loc. R. 94.05; see State ex rel. Wilson v. Industrial Comm'n of Ohio (2003), 100 Ohio St. 3d 23, 24 (per curiam). No objections have been filed within the time-period established by the Civil Rules and the Local Rules.

The exhibits were properly admitted into evidence. For good cause shown, the Magistrate's decisions are well-taken and are properly adopted.

III. Discussion of Objections to
Magistrate's March 20, 2007 Decision

The Magistrate's decision after a hearing was filed March 20, 2007. On April 3, appellants filed their objections to the Magistrate's decision.

In this regard, appellants' objections are unwarranted, and the Court adopts the Magistrate's decision.

First, appellants argue that "the documents referenced by Magistrate Angel have not been introduced into evidence by counsel for the Defendant." However, in his May 15, 2001 decision, the Magistrate states that he "finds that all of those records have been appropriately considered and hereby stands by the Report and Recommendation offered previously." As previously discussed, the documents have been properly admitted into evidence. Thus, this objection is unwarranted.

Second, appellants argue that "[o]nce the consultative psychological assessment was complete, Dr. Arnold's authority to continue to observe, assess, or examine Gregory in any way was prohibited without the Stancourts' express authorization" and so "the testimony of Dr. Arnold regarding the classroom observations and his evaluations of Gregory Stancourt" should be stricken.

However, the Magistrate's March 20, 2007 decision held that 20 U.S.C. §1414 "does not address any continuing evaluation or the effect of a lack of consent on materials reviewed for litigation" and that "[r]esearch has provided no case law on the issue." (Magistrate's decision, p. 3.) Appellants' objections similarly cite no legal authority in support of their arguments as to striking Arnold's testimony.

In contrast, the Magistrate was in a position to evaluate the witnesses' credibility, weigh the evidence, and make a factual determination, and his holding is reasonable and in accordance with the law. Thus, this objection is unwarranted.

Third, appellants argue that the only evidence as to harm "is the testimony of Dr. Lybarger who stated that Gregory suffered harm" and again argue that Arnold's testimony should not be considered.

However, the Magistrate's March 20, 2007 decision discussed Arnold's testimony and noted that "Arnold, when asked as to Lybarger's report and his opinion of harm[,] disagreed" and that "[t]he district's expert contended that the implementation of the phase out was neither a change or deletion from the original IEP, nor did it create a detrimental effect upon the student." (Magistrate's decision, pp. 9, 15.) The Magistrate concluded that if the addendum to the plan "was a modification or change, the further segment of inquiry is whether there was a substantive violation and/or one which was detrimental" and that "the answer to that compound question is no"; that "the phase out was not detrimental"; that "the proposed phase out" did not "implicate[] a detrimental change"; and that "[i]t can not be concluded that the addendum implicated a detrimental change or fundamental change nor did it eliminate a basic element of the IEP or educational program." (Magistrate's decision, pp. 20-21, 24-26.)

As such, Arnold's testimony did address the issue of whether harm occurred. Also, as previously discussed, Arnold's testimony should not be stricken and so should not be excluded from consideration.

Likewise, appellants' disagreement with the Magistrate's conclusion that any change was not detrimental and their arguments regarding Arnold's May 9, 2002 observation concern disagreements with the Magistrate's findings but do not demonstrate that the Magistrate's decision is erroneous. The Magistrate was in a position to consider and weigh the evidence, including witnesses' testimony, and make a factual determination.

The Magistrate was in a posrtion to evaluate the witnesses' credibility, weigh the evidence, and make a factual determination, and his findings of fact and conclusions of law are reasonable and in accordance with the law. Thus, this objection is unwarranted.

Fourth, appellants argue that the Magistrate erroneously found that the IDEA'S procedures had not been violated because "the only competent evidence before the Court regarding the harm suffered by Gregory as a result of the removal of the Behavior Plan by means of the unilateral action of Worthington Schools is that given by Dr. Lybarger" and "[i]t is, therefore, impossible for Dr. Arnold to give evidence of the harm suffered as a result of a change when the expert denies that a change occurred." However, as previously discussed, appellants have failed to provide a legal basis for not considering Arnold's testimony.

Rather, whether the school district's actions constituted a "change" in the plan and whether harm resulted from the school district's actions are separate matters, and Arnold's opinion on the former does not bar consideration of his testimony on the issue of harm. Whether or not he thought that the school district's actions constituted a "change" in the plan or

merely further implementation of the plan, Arnold testified that harm did not result. As previously discussed, the Magistrate was in a position to evaluate the witnesses' credibility, weigh the evidence, and make a factual determination, and his findings of fact and conclusions of law are reasonable and in accordance with the law.

Appellants also argue that "[i]t is undisputed that the prior written notice required by 20 U.S.C. § 1415 was not provided to the Stancourts before April 15, 2002" and that "[t]he only possible dispute between the parties is whether or not that failure to provide prior written notice caused substantial harm to Gregory's educational progress" and so "object to any finding by the Magistrate that a procedural violation did not occur."

However, the Magistrate's decision discussed this matter as follows:

> The Court in Berger v. Medina City Sch. Dist. followed the holding in Knable v. Bexley City School Dist. which had determined that a procedural violation of IDEA is not necessarily a denial of FAPE unless it causes substantive harm to the child or his parents; such as seriously infringing on the parents' opportunity to participate in the IEP process, depriving an eligible student of an IEP, or causing the loss of educational opportunity. Id. at 765-66.
>
> . . . .
>
> . . . . While a technical violation may have occurred as to timing, the Stancourts were aware of the school's intent when they met with the IEP team on the 10th and refused to give

> their consent. A procedural violation has therefore occurred if it is assumed that the phase out of the behavior reinforcement was in fact a modification. . . . However, if for the sake of argument, it is assumed that this was a modification or change, the further segment of inquiry is whether there was a substantive violation and/or one which was detrimental. For the reasons set forth below, the answer to that compound question is no.

(Magistrate's decision, pp. 15, 20-21.)

The Magistrate engaged in a lengthy discussion in finding that "[t]here was no fundamental change in the identification, evaluation or educational placement and the stay put provision under IDEA does not apply" and that no "detrimental change" occurred so as to constitute a violation of IDEA. (Magistrate's decision, pp. 24-25.)

The Magistrate then

> concluded that the stay put provision of 20 U.S.C. 1415 did not apply to the April addendum. It can not be concluded that the addendum implicated a detrimental change or fundamental change nor did it eliminate a basic element of the IEP or educational program. As such the procedural violation of the late written notice to the Appellants does not warrant further action. It is recommended that the appeal be dismissed.

(Magistrate' s decision, p. 26.)

Thus, while the Magistrate acknowledged that a "technical violation" might have occurred as to providing written notice to plaintiffs, the Magistrate found that any such "technical violation" did not constitute a substantive or detrimental change.

In this regard, such a "technical violation" would not necessarily mean that substantive harm resulted or that 20 U.S.C. § 1415's "stay put" provision was implicated–or even that IDEA was violated. See Stancourt v. Worthington City Sch. Dist. Bd. of Educ. (Franklin 2005), 164 Ohio App. 3d 184, 204-05 ("[T]his matter should be remanded to the common pleas court so that it can make the requisite finding whether the change reflected in the addendum of April 10, 2002, implicated a detrimental change in the elements of the Stancourts' son's IEP, or whether the change reflected in the addendum of April 10, 2002, fundamentally changed or eliminated a basic element of the Stancourts' son's IEP, thereby implicating the 'stay put' provision of Section 1415(j), Title 20, U.S.Code. Furthermore, because the evidence suggests that the Stancourts received notice of the implementation of the April 10, 2002, addendum two days after this addendum was implemented, upon remand, as part of its inquiry, the common pleas court should also consider whether the school district complied with procedural requirements under the IDEA and, if not, whether such a deviation resulted in substantive harm.").

The Magistrate found that no substantive violation or detrimental change occurred and that 20 U.S.C. §1415's "stay put" provision did not apply to the April addendum. The Magistrate was in a position to

evaluate the witnesses' credibility, weigh the evidence, and make a factual determination, and his findings of fact and conclusions of law were reasonable and proper. Thus, this objection is unwarranted.

IV. Conclusion

Therefore, appellants' objections to the Magistrate's March 20, 2007 decision are DENIED, and the Magistrate's decisions are hereby ADOPTED. Counsel for appellee shall prepare an appropriate entry and submit the proposed entry to counsel for the adverse parties pursuant to Loc. R. 25.01. A copy of this decision shall accompany the proposed entry when presented to the Court for signature

/s/
CHARLES A. SCHNEIDER, JUDGE

* * *

APPENDIX C

**COURT OF COMMON PLEAS,
FRANKLIN COUNTY, CIVIL DIVISION**

**Case No. 03CV- 6746 &
03CV-12578**

[Filed March 20, 2007]

WARREN AND TAMMY STANCOURT,	)
	)
APPELLANTS,	)
	)
VS.	)
	)
WORTHINGTON CITY SCHOOL DISTRICT BOARD OF EDUCATION,	)
	)
DEFENDANT.	)
	)

JUDGE SCHNEIDER

MAGISTRATE ANGEL

**MAGISTRATE DECISION
AND RECOMMENDATION**

Entered this March 16, 2007.

The Court has referred this matter for hearing. A prior decision was rendered by the Court and upon

appeal in *Stancourt v. Worthington City School District Board of Education*, 164 Ohio App. 3d 184; 2005-Ohio-5702, the Tenth District, on October 27, 2005, reversed and remanded the case for further consideration. Evidence has been taken at separate hearings of the testimony and opinions of expert witnesses, William A. Lybarger, Ph. D. for Appellants, and Kevin Arnold, Ph.D for Appellee. The following recommendation is based upon review of the Court's previous decision, Court of Appeal's opinion, the evidence and argument offered at hearing, post trial briefs and the record of proceedings from below. Documentary evidence consisting of exhibits from both sides have also been offered and considered.

PROCEDURAL POSTURE

The single assignment of error raised by Appellants and addressed by the Court of Appeals was whether there was error in finding that the addendum of April 10, 2002, was part of their son's "stay put" IEP. The Appeals Court found that there was error and instructed there should be a "requisite finding whether the change reflected in the addendum of April 10, 2002, implicated a detrimental change in the elements of the Stancourts' son's IEP, or whether the change reflected in the addendum of April 10, 2002, fundamentally changed or eliminated a basic element of the Stancourts' son's IEP, thereby implicating the "stay put" provision of Section 1415(j), Title 20, U.S.Code. Furthermore, because the evidence suggests that the Stancourts received notice of the implementation of the April 10, 2002, addendum two days after this addendum was implemented, upon remand, as part of its inquiry, the common pleas court should also consider whether the school district

complied with procedural requirements under the IDEA and, if not, whether such a deviation resulted in substantive harm." ¶68

Two inquiries must therefore be made. First, it must be determined whether implementation of the addendum was procedurally correct under IDEA. The second consideration is whether a fundamental change or elimination of a basic element of the IEP occurred. In the latter context, the Court is to consider whether there was a detrimental change. Appellants have posited that fundamental change is a separate inquiry from detrimental change.

While not an issue raised until the hearing in this matter, Appellants have objected to testimony by Appellee's expert relating to records, observations or evaluations upon matters subsequent to March 2002. Appellants maintain that under the provisions of 20 U.S.C. 1414(C)(3), Dr. Arnold had no authority to continue observations, or review records after expiration of the parental consent form executed in May or July 2001. As to this proposition, it will first be observed that the school district's expert would have been permitted to review and evaluate the materials, records, etc. examined and relied upon by Appellants' expert, Dr. Lybarger.

A review of § 1414 does indicate that parental consent must be obtained for an initial evaluation and the evaluation is to be conducted within sixty (60) days unless another timeframe is established. (I, II) The statute does not address any continuing evaluation or the effect of a lack of consent on materials reviewed for litigation. Research has provided no case law on the issue. The factual background suggests that the

Stancourts knew Arnold was continuing to work with the school in evaluating the IEP. Both upon practical and legal considerations, Appellants' position as to bar hold's testimony is rejected.

A brief recapitulation of facts is set forth as to the circumstances giving rise to the court action.

FINDINGS OF FACT

1. Appellant's son ("G"), the student at involved in this action, was born in August of 1990.

2. In January 2002, he was attending Worthington City School School District (District) in the fifth grade. He had been diagnosed with a learning disability, more specifically Attention-Deficit/ Hyperactivity Disorder (ADHD).

3. The parents and system agreed that there was a need for specialized education and an Individualized Education Program (IEP) was prepared and implemented by agreement of the parents and district. The commencement date of the IEP at issue was January 22, 2002.

4. Addenda, dated February 8, March 12, and April 10, 2002 were implemented by the district. It is the April 10, 2002 addendum which has given rise to this litigation and the appeals at the state level.

5. The parents did not agree to a "phase out plan addendum to current behavior plan" that was the subject of the April 10th meeting.

6. The district sent notification to the parents on a form titled PS-401, dated April 13, 2002, that they intended to implement initiation of phase out of the behavior plan. The form's reason for action stated: "On April 10, 2002 the IEP team, including Mr. and Mrs. Stancourt, met. The purpose of the IEP meeting was to discuss the proposed phase out of the behavior plan included in G...'s January 22, 2002 IEP because the January 22 IEP indicated that, when mastery of the targeted behaviors was achieved, the IEP team would be reconvened to discuss fading of the reinforcers. With regard to this issue, the IEP team proposed an IEP amendment to implement the fading and phase out of the reinforcers. The Stancourts did not offer any alternative proposal for consideration with regard to fading or phase out.*** Because G... has reached the criteria on each of the goals and objectives related to the behavior plan, the school district believes that it is necessary and appropriate to begin to fade the reinforcers. Therefore the school district will proceed to implement the phasing out of the reinforcers as determined at the April 10, 2002 IEP meeting. The phasing out will be implemented beginning April 15, 2002."

7. Appellants state that they received the letter on April 17th and in response requested an impartial due process hearing by letter dated May 31, 2002. They dismissed this request.

8. Prior to that request, the district had met with Mr. Stancourt with a plan to implement a new

IEP for the ensuing school year A new IEP was never agreed upon.

9. Appellants filed a second request for a due process hearing on August 26, 2002, asserting that "the addendum, dated April 10, which Worthington Schools implemented without our consent or participation and the new IEP which has been drafted and which eliminates all reference to social skills needs. Also, the lack of a social skills goal and objectives in the current IEP. [sic.]"

10. The hearing request was twice dismissed at the state level. The first dismissal was with prejudice. The second dismissal on May 12, 2003 was without prejudice and granted the parents the right to reopen the appeal if the records were furnished. Thus Court issued a ruling on June 4, 2004 on appeal of those dismissals. The Court of Appeals issued its opinion as noted above and the Trial Court committed the appeal to this writer for additional evidence and recommendation.

11. The video and written deposition testimony of William Lybarger, Ph.D reflects that he has been an expert witness in six to ten cases involving IEP litigation. (Transcript 12) He has background and education in special education, but his employment for the last twelve years has been as a professor of management at Friends University in Wichita Kansas. His doctorate was in behavior disorders.

12. Lybarger's opinion was that the April 10, 2002 addendum was a detrimental change and made fundamental component changes. (Transcript 16-17)

13. From 1993 or 1994 to 2003, Lybarger worked on two or three student IEPs. (Transcript 30)

14. Lybarger reviewed school records running up to 2006, a neurological evaluation from 2004 and the Court of Appeal's opinion.

15. Lybarger disputed the official versus unofficial documents from the school. He opined that the actual class notes were contradictory to the reports in the record. (Transcript 128)

16. In the deposition, counsel for Appellee attempted to elicit testimony as to discussions between Lybarger and counsel for Appellants.[1] Those communications are considered work product and privileged and are not a matter for presentation to the Court and thus have been ignored.

17. Likewise, the attempts to have the expert offer legal opinions have been disregarded.[2]

18. Lybarger opined that the behavior component of the IEP was a fundamental issue and the foundation of not only the student's academic

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[1] Transcript pages 75 to 92

[2] Transcript pages 110 to 119

performance, but also for gaining socialization as part of the public school process.[3]

19. Lybarger continued with his opinion that by removing the behavior management plan, the schools created a cumulative and negative effect for the succeeding three years.[4]

20. Kevin Arnold offered his testimony in court. He has a Ph.d in psychology and other post doctoral training. He currently provides services to various schools or individuals and governmental entities in psychology.

21. His testimony indicated that his familiarity with with IEPs is based in part upon consultation work on programs in seven states involving IEPs, including compliance and evaluations. He has also worked with the Department of Education doing services with a 2001 federal grant involving assessments and IEP in Ohio and Wisconsin. He is in active practice doing assessments, some directly in school systems and others in his office.

22. Arnold has previously had direct contact with G for evaluation, both academically and behaviorally and he provided reports and participated with IEP development.

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[3] Transcript page 18

[4] Excerpted from Deposition Exhibit B

23. Arnold's observations were during two days in September and October 2001. He also interviewed the Stancourts in July of 2001.

24. Arnold offered his evaluation of G's behavior and the substance of the evaluation as to behavior and performance will not be reiterated. His evaluation led to giving recommendations as to a reward plan with specific rules, having both positive and negative responses.

25. Arnold stated several times that the behavior reward system had a thinning component. Arnold explained that the plan had five behavioral aspects to meet. It focused upon improvement of behavior, social skill mastery, and while the wording was "fading of reinforcers", the correct verbage should have been thinning of reinforcers.

26. He stated that the original plan had the intent to have thinning because the effectiveness of the plan would have been lessened without such a component. He also devised the plan to allow reinstitution of the behavior component if necessary.

27. Arnold disputes that there was any change to the original IEP but stated that beginning the phase out, because the plan contemplated such a phase out or thinning, was a continuing implementation of the IEP.

28. Arnold did an observation on May 9, 2002 and determined that G's behavior was markedly changed from the fall. A letter from Warren

Stancourt, dated March 29th appears to reflect success as well. (Exhibit 22)

29. Arnold had no participation with G's plan after November 2002.

30. Arnold, when asked as to Lybarger's report and his opinion of harm disagreed. Arnold stated that up to the point of his discontinuation of involvement, he believed there was success and he disagreed with the conclusion of Lybarger that removal of behavior reinforcement was a change of the IEP.

31. He further offered that if reinforcers had been continued, satiation would have occurred and they would have become less effective.

32. He also stated that failure to do the thinning or fading would have failed to acclimate G to normal life and school situations.

33. Arnold didn't feel it appropriate to address events after November 2002 which may have affected grades as there could have been unknown factors to evaluate. He felt that the parent's choice of higher level math could have affected grades received and the same with a foreign language.

34. A review of the materials submitted indicates that G was achieving success in the following school year and this occurred with the phasing out of the behavior plan.

35. While records have been offered for seventh and eighth grade, these have only been summarily reviewed. They do indicate academic and behavioral problems, especially with respect to science, algebra, and French. Final grades for the seventh grade reflect all passing scores with five subjects with A's or A-. Final grades for the eighth grade reflect four grades of A's or A-, but final grade of F in French and D- in Algebra and Health and D in science. Again it must be noted that the final grades in the eighth grade are three years removed from the April 2002 IEP addendum issue. It will also be observed that one of the consistent issues in notes from the French teacher was a failure to complete assignments, including homework. Any failure by the behavioral program changes would not appear relevant to failure to complete homework assignments in any of the subjects.

36. The school records also evidence that taking algebra in the eighth grade was specifically recommended against by the staff, but the school acquiesced to the parents' desire. In addition, instead of remedial math in the seventh grade, the Stancourts required the school to place G in regular math.

37. Because of the myriad of factors which may have affected the succeeding school years, the determination of affect of the implementation of the April addendum and issues of the 2002 IEP upon G's educational situation focuses upon the 2002-2003 school year, grade 6.

38. A progress report running through January 28, 2003, halfway through the sixth grade notes successful behavior in all areas including behavior.

39. As of August of 2004, the parents and the district were still at odds over behavioral skills as part of the IEP. Stancourts wanted social skill components added and the district concluded that G was not lacking social skills nor had the phase out had a negative effect upon his education.

40. Lybarger concluded that the position of the district as to satisfactory progress and individual teacher's concerns were at odds. The neuropsychological evaluation from May 19 and 20, 2004, done by Dr. Bodin, at page 4 notes that G's teachers did not report clinically significant concerns as to behavior other than some concerns over repetitive behavior. The Stancourts, on the other hand, reported various concerns as to anxiety, withdrawal, depression, social problems and attention.

41. Bodin's recommendations did not offer a reward based system for implementation at school but suggested a highly structured setting and close monitoring to help him stay on task.

42. Continuing into April 2004, the Stancourts and the district were still in disagreement as to social skills and behavior exhibited by 6.

43. Returning to the sixth grade, his teachers signed their agreement to a evaluation team

report dated April 30, 2003. That report did not denote behavior issues and was, in general, a positive report. In the year following the fading of behavior plan reward system, G showed no detrimental effect as far as can be gleaned from the records.

44. Review of a June 13, 2003 report from G's sixth grade teaches does not support the Stancourt's or Lybarger's opinion that the behavior reward phase out was detrimental to G's educational progress. Both the classroom teacher and the special teachers for music, physical education and art all had positive comments and no serious concerns.

45. The records indicate that one or both parties developed a litigation mentality which may have been disadvantageous to G's middle school success. Each side appeared to seek to place conditions or restrictions on evaluations and the use of evaluations and as a result, this stance may have been one of the contributing factors in some of his difficulties in middle school.

CONCLUSIONS OF LAW

Appellants contend that the IEP that is subject to the "stay put" provision is the last agreed upon IEP prior to the disputed addendum of April 10, 2002, namely the IEP as amended by the addendum of March 12, 2002. The appellate decision has instructed the court to determine whether the change in the April addendum was a detrimental change or a change that was a fundamental change or eliminated a basic element of the educational program. Under existing

case law, Appellants have the burden of proving by a preponderance of the evidence that the IEP is the product, of defective procedure or is substantively inappropriate." *Brimmer v. Traverse City Area Pub. Schools*[5] The *Brimmer* Court also concluded that because the legislation was remedial in nature, the determination of a fundamental change in or elimination of a basic element adversely affecting the child's learning experience should be given an expansive reading, but it is necessarily a fact-specific determination. A review of the sundry cases dealing with the stay put issue reflects that a common denominator in those cases involves a change in the placement of autistic children or other children with severe learning disabilities or physical limitations. The connotation of "change in educational placement" is most often one of the actual school or type of classroom environ.

The Tenth District decision pointed out that the earlier decision had used Ohio Administrative Code (O.A.C.) 3301-51-01(H) and 3301-51-05(E)(1)(d) which were made effective after the April 2002 addendum. The version of O.A.C. 3301-51-01(H) in effect in April 2002, identified continuum of alternative placements as regular classes, supplemental services, individual/small group instruction, special class/learning center located in a public school building, a separate school in the district, a separate facility such as a county board of mental retardation and developmental disabilities facility, Ohio State

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[5] (W.D.Mich. 1994), 872 F. Supp. 447, 449, citing *Doe v. Board of Educ.* (C.A.6, 1993), 9 F.3d 455, 458, certiorari denied (1994), 511 U.S. 1108, 114 S. Ct. 2104, 128 L. Ed. 2d 665

school for the Blind or school for the deaf, or other state institutions, or home instruction. The newer version eliminated the specifically identified schools and appears to have rephrased supplemental services to include as itinerant services as a replacement to individual/small group instruction. Neither version of the code was exclusive as to continuum of placement. Nonetheless. neither addresses a change in or a tentative curriculum modification.

The rationale behind the stay put provision under IDEA is easily discerned. When dealing with a child with learning disabilities, continuity in their education has importance. Shifting a child from one school to another, from a specialized classroom to a mainstream class, or any other type of significant change in the elements of the educational program which might be detrimental to the student are matters for which the stay put provision was designed.[6] The Tenth District, applying the holding in *Tennessee Dept. of Mental Health & Mental Retardation v. Paul B.*, at 1474, found that this Court had made no determination of whether there was a detrimental change or whether the addendum change was fundamental or eliminated a basic element of the educational program. Appellants' expert testified that elimination of the behavioral component was both a fundamental part of the IEP and detrimental. The district's expert contended that the implementation of the phase out was neither a change or deletion from the original IEP, nor did it create a detrimental effect upon the student.

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[6] *Tennessee Dept. of Mental Health & Mental Retardation v. Paul B.* (C.A.6, 1996), 88 F.3d 1466, at 1474

The Court in *Berger v. Medina City Sch. Dist.*[7] followed the holding in *Knable v. Bexley City School Dist.*[8] which had determined that a procedural violation of IDEA is not necessarily a denial of FAPE unless it causes substantive ham to the child or his parents; such as seriously infringing on the parents' opportunity to participate in the IEP process, depriving an eligible student of an IEP, or causing the loss of educational opportunity. *Id.* at 765-66.

McLaughlin v. Holt Pub. Schools Bd. of Edn.[9] requires a Court to determine if the state has complied with procedural requirements of the Act, and if the IEP developed is reasonably calculated to enable the child to receive educational benefits. This holding follows that of the Supreme Court in *Board of Education v. Rowley*[10]. In *Rowley,* it was determined that the reviewing court required that a court "receive the record [*sic*] of the [state] administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." (quoting 20 U.S.C.A. § 1415(e)(2) The Court cautioned "In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. n29

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[7] 348 F.3d 513 6th Cir. Ohio 2003

[8] (C.A.6, 2001), 238 F.3d 755, certiorari denied, 533 U.S. 950, 121 S. Ct. 2593, 150 L. Ed. 2d 752 at 764

[9] (C.A.6, 2003), 320 F.3d 663

[10] (1982), 458 U.S. 176, 206-207, 102 S. Ct. 3034, 73 L. Ed. 2d 690

at 207 In reviewing the procedural aspects and determining if the IEP is providing a fair and adequate educational opportunity, from is not to be exalted over substance."[11]

As to the stay put issue, the reviewing courts have likened the mechanism to an automatic preliminary injunction."[12] It is designed to maintain the status quo so that a school does not exclude a disabled student or change his placement prior to the due process hearing.

The development and implementation of the IEP are the cornerstones of the Act. The IEP is the written statement which sets out an educational program to meet the particularized needs of a child with disabilities. The development and implementation of IEPs are considered crucial to offering a FAPE.[13] Parents must be provided an explanation of why an action was proposed or refused, a description of any options the school considered and why those options were rejected, a description of the evaluation procedures used to form the basis of the proposal or the refusal, and a description of other relevant factors. 34 C.F.R. 300.505(a); *Paul B.*, supra at 1472 In considering the facts in this action, it appears that the district met the requirements of the legislation and the dictates of the applicable case law.

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[11] *Winkelman v. Parma City Sch. Dist.*, 411 F. Supp. 2d 722

[12] *Zvi D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982)

[13] 20 U.S.C. § 1401(a)(20; *Honig v. Doe*, 484 U.S. 305, 311, 98 L. Ed. 2d 686, 108 S. Ct. 592 (1988)

The Courts have consistently held that an appropriate education is not synonymous with the best possible education or ideal education.[14] Further, the issue of parent participation in IEP formulation and changes does not denote veto power of the plan by the parents, but rather a right to meaningfully participate.[15] In *Thomas v. Cincinnati Bd. of Educ.*[16] the Court recognized that "in assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child."

The record of proceedings supplied to the Court evidences that the April addendum is not the first occasion that gave rise to a dispute between the Stancourts and the district. It is apparent that in 2000 an issue as to the behavior component of the current IEP was in controversy. The unmodified IEP of January 22, 2002, at pages 7 and 8, discusses behavior strategies and at #16, page 8, it is handwritten that: "When mastery is reached the IEP team will be reconvened to discuss fading of reinforcers." The February addendum notes that Mr. Stancourt has

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[14] *Cordrey v. Euckert*, 917 F.2d 1460, (6th Cir. Ohio 1990)

[15] *Kings Local Sch. Dist. Zelazny*, 325 F.3d 724 *6th Cir. Ohio 2003*

[16] 918 F.2d 618, 624 (6th Cir. 1990) (quoting *Rowley*, 458 U.S. at 206)

asked for testing to be done in the regular classroom with no accommodations. The April addendum indicates the Stancourts would not sign the modification to phase out the behavior plan. Implementation of the plan began on the 15th of April and the Stancourt's received written notice of an intent to implement the plan on the 17th. Appellants acknowledge that a meeting to discuss an IEP for the 2002-2003 year occurred on May 28, 2002, but they assert that the district had its own agenda and because of the disagreement, no new IEP was implemented. Appellants first requested a due process hearing on May 31, 2002, which they subsequently dismissed. They again requested a hearing on August 26, 2002. The first hearing officer dismissed the request for hearing based upon the Stancourt's failure to provide discovery. A second hearing officer modified the dismissal to one without prejudice. To this juncture, this court is the only entity to offer an independent opinion as to the merits or deficiencies of the April addendum.

The applicable federal regulation, 20 U.S.C. § 1415, titled Procedural Safeguards, mandates the following in subpart "(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency- (A) proposes to initiate or change; or (B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child." R.C. 3323.05 uses similar language at part (C). "Prior written notice to the child's parents of any proposal or refusal to initiate or change the identification, evaluation, or educational placement of the child***."

The federal regulation further requires under Notification requirements" (1) Content of prior written notice. The notice required by subsection (b)(3) shall include--

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part [20 USCS §§ 1411 et seq.] and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this part [20 USCS §§ 1411 et seq.];

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal."

The other applicable portion is in subpart (j) which states:

"Maintenance of current educational placement. Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

In the current instance, the District implemented the phase out of reinforcers beginning April 15th, although the notice to the parents wasn't apparently received until the 17th. While a technical violation may have occurred as to timing, the Stancourts were aware of the school's intent when they met with the IEP team on the 10th and refused to give their consent. A procedural violation has therefore occurred if it is assumed that the phase out of the behavior reinforcement was in fact a modification. The opinion of Dr. Arnold was that the April addendum continued to implement the original plan of the January IEP in regard to the behavioral aspect of the plan. This writer concurs with that opinion. However, if for the sake of argument, it is assumed that this was a modification or change, the further segment of inquiry is whether there was a substantive violation and/or one which was detrimental. For the reasons set forth below, the answer to that compound question is no.

This decision must return to the issue of the stay put. Returning to the April addendum language, the second page provided that "***If the target behaviors are not achieved at 80% in 4 weeks, the original behavior plan needs to he reinstated." Appellants seek

to have the Court find that this generates application of 20 U.S.C. §1415 (j), as the then-current educational placement of the child. A plethora of federal courts have delved into the semantics of the "then-current educational placement of the child."[17] A review of those cases evidences a change of location, ie. different classroom, different school, school in another state, or some other type of significant change in the educational regimen. What has been common to the cases is deference to the educational expertise of the reviewing agency.[18] In the appeal, sub judice, the Court does not have the benefit of the agency's review because the appeal was dismissed. The guidance must therefore come from the various cases addressing similar issues.

Under the IDEA, a "change in placement" is defined as a fundamental change in, or elimination of, a basic element of a child's educational program.[19] As remarked above changes to the child's length of school day, shortening of the school year, or physical

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[17] *Cordrey v. Euckert*, 917 F.2d 1460 (6th Cir. 1990)
J.D. v. Manatee County Sch. Bd., 340 F . Supp. 2d 1316; Florida (2004)
Hall v. Vance County Bd. of Education, 774 F.2d 629 (4th Cir. 1985)
Morgan v. Chris L. by Mike L., No. 94-6561, (6th Cir. Appeals 1997)
P.R. Woodmore Local Sch. Dist., 2006 U.S. Dist. LEXIS 60875 (N.D. Ohio Aug. 28, 2006)

[18] *J.K. v. Fayette C'ty Bd. of Educ.*, 2006 U.S. Dist. LEXIS 3538, 2006 WL 224053

[19] *Lunceford v. District of Columbia Board of Education*, 241 U.S. App. D.C. 1, 745 F.2d 1577, 1582 (D.C. Cir. 1984)

movement of the chid have been brought to the courts seeking stay put decision. In *Abney v. District of Columbia*[20], the court held a change in placement had not occurred when a student was transferred from one school to another with a comparable program. In *Tilton v. Jefferson County Board of Education*, 705 F.2d 800 (6th Cir. 1983), cert. denied. 465 U.S. 1006, 79 L. Ed. 2d 231, 104 S. Ct. 998, 104 S. Ct. 999 (1984) it was determined that a change in placement did occur when a student was transferred from a year-round program to an alternative 6-month program.

The Court remarked in the earlier decision at page 16 that "implementation of IDEA was not to give Appellants or any parents the ability to micromanage every decision made by the educational system as it regards a student." To carry that conclusion further, the purpose of FAPE is to give parity to the student with learning disabilities by providing instruction and setting to allow each a free appropriate public education. If Appellants' contentions are correct, then any parent of a child determined to have a handicap can seek the automatic stay provisions when recess hours are changed, classroom locations are moved, math and language instruction blocks are rearranged in the students schedule, and any other host of changes to the child's school day. These comparisons are not meant to denigrate Stancourt's obvious dedication to achieving the best possible education for their son. While undoubtedly attuned to what they believe are their child's needs, the intent and reach of the IDEA should not allow parents the right to overrule the school in such particularized areas. As

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[20] 270 U.S. App. D.C. 362, 849 F.2d 1491, 1492 (D.C. Cir. 1988)

noted, IDEA does not guarantee the best or ideal education, but a fair and appropriate education.[21]

This writer concludes after consideration of the expert testimony and record from below that the tentative change in behavior reinforcement contemplated in the April addendum was neither a fundamental change, nor an elimination of a basic element of education. The word tentative was used above. The precise language of the addendum was to attempt to phase out the reinforcers as was contemplated in the original January IEP. While Appellants' expert opined that the evidence now shows that it was incorrect and had a negative effect upon G's education, hindsight is always "20 20". It was the opinion of the IEP participants, over the objection of the Stancourts, that the attempt should be made. While Lybarger's examination of records after April 2002 may have provided some credence to his conclusion that the phase out was detrimental, this after the fact snapshot is not the appropriate timeframe for determination of the question. At the time of the addendum, the records evidence that there was belief that G had mastered the goals sufficiently to begin to phase out the behavior plan. While there have been documents presented as to G's performance in subsequent school years, what actually transpired would not have been a matter of record before the state education hearing officers, nor appropriate for the Court to premise its decision. The subsequent school year, G's sixth grade, evidences a substantial degree of

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[21] *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 206-97 (7th Cir. 1988); *Renner v. Board of Educ.*, 185 F.3d 635, 872 F.Supp. 447; 1994

success. Contrary to Dr. Lybarger's opinion, this writer finds that the phase out was not detrimental. Because of the litigation, an accord for the proper educational plan was not reached for the succeeding years. Even though recommendations were made to the Stancourts not to place their son in eighth grade Algebra, their desire prevailed and his lack of success was shown in the record. While failing grades in math, French, and science were not acceptable to the Stancourts, nor desired by the district, the causation for those failing grades has not been evinced by the documentary evidence to rest upon the lack of behavioral reinforcement. The change as to multiple teachers, switching classes and the other sundry changes from elementary to middle school are factors which may or may not have had a negative impact on G's success. There is no viable scope to peer backward and attribute to poor grades in several subjects to any specific causative factor.

It is concluded that the maintenance of the current placement of a student as to IEP does not exclude modifications to the IEP such as were already in the plan in this instance. There was no fundamental change in the identification, evaluation or educational placement and the stay put provision under IDEA does not apply. As to the second consideration of whether the proposed phase out implicated a detrimental change, the conclusion is similar. If the individuals involved in the hands on regimen of G's schooling determined that he had reached the stage to alter his behavioral reinforcement plan, and if it did not achieve its goals after four weeks, the prior plan would be reinstituted, the latitude to do so should rest with the school. The change was not in the nature of changes considered in the multitude of cases which invoked the

stay put provision. Applying the examination suggested in *Berger v. Medina City Sch. Dist.* and *Knable v. Bexley City School Dist.*, supra, this writer finds no violation of the IDEA or Ohio statutory scheme.

It should be noted that Appellants dismissed their due process appeal and thus left implementation of the addendum through the end of the school year. They were given the opportunity to meet and possibly come to some accord as to implementation of a new IEP for the upcoming year but instead filed their due process appeal at the beginning of the next school year. The delay was further exacerbated by Appellants' refusal to comply with discovery requests which ultimately resulted in dismissal at the state levels. The above facts are recited only because the ultimate objective of the Stancourts to have a timely due process hearing on the propriety of the IEP addendum was primarily thwarted due to their inaction and failure to cooperate.

It is concluded that the stay put provision of 20 U.S.C. 1415 did not apply to the April addendum. It can not be concluded that the addendum implicated a detrimental change or fundamental change nor did it eliminate a basic element of the IEP or educational program. As such the procedural violation of the late written notice to the Appellants does not warrant further action. It is recommended that the appeal be dismissed.

*Pursuant to Civ. R. 53, the parties are advised that objections to this decision must be filed within fourteen (14) days of its filing. Under Civ. R. 53(E)(3)(6): "Objections shall be specific and state with particularity the grounds of the objection." (c)"***Any*

objection to a finding of fact shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or an affidavit of that evidence if a transcript is not available." (d) "A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion as required by this rule."

/s/
Magistrate Michael W. Angel

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APPENDIX D

IN THE COURT OF APPEALS OF OHIO TENTH APPELLATE DISTRICT

No. 04AP-870
(C.P.C. No. 03CVF-11-12578)

[Filed October 27, 2005]

Stancourt et al.,	)
Appellants and	)
Cross-Appellees,	)
	)
v.	)
	)
Worthington City School District	)
Board of Education,	)
	)
Appellee and	)
Cross-Appellant.	)
	)

(REGULAR CALENDAR)

OPINION

Rendered on October 27, 2005

Stein, Chapin & Associates, L.L.C., Lance Chapin, Amanda K. Zibners, and Beth J. Nacht, for appellants and cross-appellees.

Bricker & Eckler, L.L.P., Nicholas A. Pittner, Susan E. Geary, and Jennifer A. Flint, for appellee and cross-appellant.

APPEALS From The Franklin County Court of Common Pleas.

PETREE, Judge.

{¶1} Appellants and cross-appellees, Warren and Tammy Stancourt, appeal from a judgment of the Franklin County Court of Common Pleas related to an administrative appeal under R.C. 3323.05. Appellee and cross-appellant, Worthington City School District Board of Education, cross-appeals and moves to dismiss the instant appeal for lack of subject-matter jurisdiction. For the reasons that follow, we deny appellee's motion to dismiss this appeal, and we affirm in part and reverse in part the judgment of the common pleas court.

{¶2} This matter arises from appellee's purported violation of the Individuals with Disabilities Education Act ("IDEA"), Section 1400 et seq., Title 20, U.S.Code. In *Austintown Local School Dist. Bd. of Edn. v. Mahoning Cty. Bd. of Mental Retardation & Dev. Disabilities* (1993), 66 Ohio St.3d 355, the Supreme Court of Ohio described the IDEA as follows:

> The Individuals with Disabilities Education Act ("IDEA"), Section 1400 *et seq.*, Title 20, U.S.Code, provides federal funding to assist state and local educational agencies in educating children with disabilities. The purpose of IDEA is "to assure that all children with disabilities have available to them * * * a

> free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities."

Id. at 360, quoting former Section 1400(c), Title 20, U.S.Code.

{¶3} "To qualify for federal assistance, states must enact policies and procedures which are consistent with IDEA requirements. * * * Ohio has done so through R.C. Chapter 3323. In addition, the State Board of Education has promulgated rules for the education of handicapped children under authority granted in R.C. 3323.03 and 3323.04." Id. (Footnote omitted.) See, generally, Ohio Adm.Code Chapter 3301-51.

{¶4} "Incorporated in R.C. Chapter 3323 is the purpose of IDEA: to provide handicapped children a free, appropriate public education tailored to the unique needs of each child by developing an IEP [individualized education program] which places the child in the least restrictive environment." Id. at 360, citing R.C. 3323.01(D) and (E), 3323.02, 3323.08(C); former Ohio Adm.Code 3301-51-02(E)(1)(d)(iv).

{¶5} According to the evidence, the Stancourts' minor son received special education services through the Worthington City School District. During the

2001-2002 academic year, when the Stancourts' son was in sixth grade, a dispute arose between the Stancourts and the school district concerning their son's individualized education program ("IEP"). Specifically, the Stancourts claim that the board of education violated the IDEA when it allegedly unilaterally changed their son's IEP, when it failed to comply with the IDEA's procedural safeguards, and when it allegedly misled the Stancourts concerning its intention to implement proposed changes.

{¶6} In January 2002, an IEP was created to address the educational needs of the Stancourts' son. Both the Stancourts and the school district agreed to the program contained in this IEP. Thereafter, three addenda, dated February 8, March 12,[1] and April 10, 2002, were added to the IEP of January 2002. The Stancourts claim that they never agreed to the addendum of April 10, 2002, when they met with school officials on April 10, 2002.[2] The Stancourts further claim that after the meeting of April 10, 2002,

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[1] According to the evidence, although Mr. Stancourt consented to the addendum of March 12, 2002, he also indicated that he disagreed with a decision not to include socialization goals and objectives in the addendum.

[2] To support their argument, the Stancourts appended to their appellate brief a transcript of the April 10, 2002 meeting with school district representatives. However, because this transcript is not included in the certified record, we do not consider it in this appeal. See *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus ("A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter"); see, also, App.R. 9(A) (composition of the record on appeal).

the school district failed to provide them with timely notice that changes in their son's IEP, which were based upon the addendum of April 10, 2002, had been implemented.

{¶7} On May 28, 2002, the Stancourts and representatives from the school district met to discuss an IEP program for the Stancourts' son for the next academic year. Three days later, the Stancourts filed for a due-process hearing; however, they later withdrew this request.

{¶8} On June 7, 2002, without the Stancourts in attendance, representatives from the school district met to discuss the Stancourts' son's IEP for the upcoming academic year. Following this meeting, the school district notified the Stancourts about the proposed IEP of June 7, 2002; however, the Stancourts did not consent to that IEP, and ultimately it was not implemented.

{¶9} On August 26, 2002, the Stancourts again requested a due-process hearing, claiming that the basis for this request was identical to the issues raised in their previous due-process-hearing request of May 31, 2002. In the May 31, 2002 request, the Stancourts stated:

> The reasons are the addendum, dated April 10, which Worthington Schools implemented without our consent or participation and the new IEP which has been drafted and which eliminates all reference to social skills needs. Also, the lack of a social skills goal and objectives in the current IEP.

{¶10} Pursuant to R.C. 3323.05(E), the Stancourts' complaint was referred to an impartial hearing examiner ("IHO"). The IHO concluded that the IEP of January 2002, with the addenda dated February 8, March 12, and April 10, 2002, constituted the Stancourts' son's IEP. During the proceedings before the IHO, an issue arose concerning the Stancourts' refusal to consent to release of their son's medical and mental-health-treatment records to the school district.

{¶11} After the Stancourts failed to comply with the IHO's order to grant release of their son's records, the school district moved the IHO to dismiss the matter with prejudice. In response, the Stancourts informed the IHO that they intended to grant the school district access to the requested records.

{¶12} In January 2003, after the Stancourts had failed to comply with the IHO's order to grant the school district access to the requested records, the school district again sought dismissal with prejudice of the Stancourts' action. Later, after the Stancourts retained legal counsel, the IHO granted a request for additional time to reply to the school district's request for dismissal. After receiving no response from the Stancourts or their legal counsel, the IHO dismissed the Stancourts' appeal with prejudice.

{¶13} Thereafter, the Stancourts appealed from the IHO's decision to the state board of education, which appointed a state-level reviewing officer ("SLRO") to consider their appeal. Finding that the IHO erred in dismissing the action with prejudice, the SLRO amended the IHO's order to a dismissal without prejudice, subject to reopening after the Stancourts

complied with the order to grant the school district access to their son's records.

{¶14} The Stancourts then appealed from the SLRO's order to the Franklin County Court of Common Pleas. In common pleas case No. 03CVF-06-6746, the common pleas court dismissed the Stancourts' appeal because their notice of appeal failed to comply with mandatory requirements of R.C. 119.12.[3] However, in its decision filed October 31, 2003, the common pleas court also concluded that because the state board of education failed to fully comply with the procedural requirements of R.C. 119.09, the appeal period had not commenced and, as a consequence, appellants were not barred from filing a timely, proper notice of appeal. Appellee did not appeal from this judgment.

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[3] In a motion before the common pleas court filed February 6, 2004, appellee requested transfer of the administrative record filed in case No. 03CVF-06-6746 to case No. 03CVF-11-12578. By entry, the common pleas court granted appellee's motion. However, in this appeal, neither party has moved to supplement the record with the record of proceedings from case No. 03CVF-06-6746. See, generally, App.R. 9(A) (composition of the record on appeal). Although neither party has moved to supplement the record with the record of proceedings from case No. 03CVF-06-6746, we nonetheless take judicial notice of the common pleas court's final judgment entry and decision in that case. See *In re Lassiter* (1995), 101 Ohio App.3d 367, 374 (stating that an appellate court may take judicial notice of a court's finding in another case); Civ.R. 44.1(A)(1) ("Judicial notice shall be taken of the rules of the supreme court of this state and of the decisional, constitutional, and public statutory law of this state"); Evid.R. 201 (judicial notice of adjudicative facts).

{¶15} On November 14, 2003, in case No. 03CFV-11-12578, the Stancourts again appealed from the SLRO's decision to the Franklin County Court of Common Pleas. In a judgment entry filed July 27, 2004, the common pleas court reversed decisions of the IHO and SLRO and remanded the matter with instructions to set a new hearing date. The common pleas court further found that the school district was entitled to the records that the Stancourts intended to offer at the hearings and to foundational materials relied upon by any expert that the Stancourts intended to call at the hearings. The common pleas court further found that a "stay-put" issue was not moot. The common pleas court also determined that the decision of the IHO to allow implementation of the April 2002 addendum was correct and that this addendum properly should be considered part of the Stancourts' son's IEP.

{¶16} From the common pleas court's judgment of July 27, 2004, appellants appeal and appellee cross-appeals. Appellee also moves this court to dismiss the instant appeal for lack of subject-matter jurisdiction.

{¶17} In its motion to dismiss, appellee asserts that the common pleas court erroneously applied the procedural requirements set forth in R.C. 119.09 and, construing R.C. 3323.05, further asserts that appellants' appeal is untimely. Appellee therefore reasons that the common pleas court lacked subject-matter jurisdiction and, consequently, this court also lacks subject-matter jurisdiction.

{¶18} "Subject-matter jurisdiction is a court's power over a type of case. It is determined as a matter

of law and, once conferred, it remains." *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, at ¶34; see, also, *Morrison v. Steiner* (1972), 32 Ohio St.2d 86, paragraph one of the syllabus ("Subject-matter jurisdiction of a court connotes the power to hear and decide a case upon its merits"). Jurisdiction is a condition precedent to a court's ability to hear a case. *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 75. "If a court acts without jurisdiction, then any proclamation by that court is void." Id., citing *Patton v. Diemer* (1988), 35 Ohio St.3d 68. A jurisdictional defect cannot be waived, and it may be raised for the first time on appeal. *State ex rel. Tubbs Jones* at 75; *Jenkins v. Keller* (1966), 6 Ohio St.2d 122, paragraph five of the syllabus. "[W]hen an appellate court determines that the trial court was without jurisdiction, it is not proper for the reviewing court to decide the merits of the case." *Eagle Fireworks, Inc. v. Ohio Dept. of Commerce*, Washington App. No. 03CA28, 2004-Ohio-509, at ¶7.

{¶19} Appellee's motion to dismiss the instant appeal challenges the propriety of the common pleas court's rulings in case No. 03CVF-06-6746. However, the judgment in case No. 03CVF-11-12578, not No. 03CVF-06-6746, is the proper subject of this appeal.

{¶20} In its motion to dismiss the instant appeal, appellee asserts that on May 12, 2003, the SLRO issued a decision and, on June 18, 2003, appellants appealed from the SLRO's decision to the common pleas court. That appeal was the subject of case No. 03CVF-06-6746. R.C. 3323.05(F) provides that any party aggrieved by the final order of the reviewing officer who was appointed by the state board of education "may appeal the final order within forty-five

days of notification of the order to the court of common pleas of the county in which the child's school district of residence is located, under Chapter 119. of the Revised Code." Because appellants' appeal to the common pleas court was within 45 days of the SLRO's order, they complied with the timing requirements of R.C. 3323.05(F). See, generally, *Painesville v. Lake Cty. Budget Comm.* (1978), 56 Ohio St.2d 282, 285, 10 O.O.3d 411, 383 N.E.2d 896, quoting *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579, 581, 53 O.O. 430, 120 N.E.2d 310, quoting *Am. Restaurant & Lunch Co. v. Glander* (1946), 147 Ohio St. 147, 150, 34 O.O. 8, 70 N.E.2d 93 ("It is established law in Ohio that ' "where a statute confers the right of appeal, adherence to the conditions thereby imposed is essential to the enjoyment of the right conferred" ' ").

{¶21} The term "jurisdiction" "encompasses jurisdiction over the subject matter and over the person." *Pratts*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶11, citing *State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833, 769 N.E.2d 846, ¶22 (Cook, J., dissenting). " 'Once a tribunal has jurisdiction over both the subject matter of an action and the parties to it, "* * * the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred * * *." ' " *Pratts* at ¶12, quoting *State ex rel. Pizza v. Rayford* (1992), 62 Ohio ST.3d 382, 384, quoting *Sheldon's Lessee v. Newton* (1854), 3 Ohio St. 494, 499.

{¶22} In case No. 03CVF-06-6746, the common pleas court determined that (1) R.C. 119.09 applied to appellants' appeal under R.C. 3323.05, (2) the state board of education had not complied with requirements in R.C. 119.09, (3) the period within

which appellants were required to appeal had not commenced, and (4) appellants were not barred from filing a timely, proper notice of appeal. Appellee did not appeal from the judgment in case No. 03CVF-06-6746. Absent an appeal by appellee, the common pleas court's rulings in case No. 03CVF-06-6746 implicate the doctrine of collateral estoppel.

{¶23} "Collateral estoppel 'precludes the relitigation of an issue that has been "actually and necessarily litigated and determined in a prior action." ' " *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 102 Ohio St.3d 283, 2004-Ohio-2947, at ¶10, quoting *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 107, 538 N.E.2d 1058, quoting *Goodson v. McDonough Power Equip., Inc.* (1983), 2 Ohio St.3d 193, 195. "Collateral estoppel applies when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) where the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action." *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 183.

{¶24} In *Scholler v. Scholler* (1984), 10 Ohio St.3d 98, the Supreme Court of Ohio held:

> A point of law or a fact which was actually and directly in issue in the former action, and was there passed upon and determined by a court of competent jurisdiction, may not be drawn in question in a subsequent action between the same parties or their privities. The

> prior judgment estops a party, or a person in privity with him, from subsequently relitigating the identical issue raised in the prior action.

Id. at paragraph three of the syllabus.

{¶25} Here, whether the procedural requirements of R.C. Chapter 119 applied to appellants' appeal under R.C. 3323.05 was a point of law that was actually and directly in issue before the common pleas court in case No. 03CVF-06-6746. Having failed to appeal from the common pleas court's judgment in case No. 03CVF-06-6746 that R.C. Chapter 119 applied to appellants' appeal, appellee is now precluded from challenging this point of law in this appeal.

{¶26} Furthermore, having failed to appeal from the common pleas court's judgment in case No. 03CVF-06-6746 that appellants were permitted to file another appeal from the SLRO's decision, appellee also is precluded from challenging that determination in this appeal. See *State ex rel. Pendell v. Adams Cty. Bd. of Elections* (1988), 40 Ohio St.3d 58, 60 ("Where a notice of appeal is not filed within the time prescribed by law, the reviewing court is without jurisdiction to consider issues that should have been raised in the appeal").

{¶27} In the instant appeal, in response to the common pleas court's unchallenged determination in case No. 03CVF-06-6746 that appellants were not barred from filing another appeal from the SLRO's decision of May 12, 2003, appellants appealed from the SLRO's decision on November 14, 2003. On July 27, 2004, the common pleas court rendered judgment concerning their appeal of November 14, 2003. From

this judgment, appellants appealed to this court on August 26, 2004. See, generally, App.R. 4(A), which provides as follows:

> A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.

Cf. R.C. 119.12 (providing that an appeal from the common pleas court's judgment under R.C. Chapter 119 "may be taken either by the party or the agency, shall proceed as in the case of appeals in civil actions, and shall be pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code"); R.C. 2505.07 ("After the entry of a final order of an administrative officer, agency, board, department, tribunal, commission, or other instrumentality, the period of time within which the appeal shall be perfected, unless otherwise provided by law, is thirty days").

{¶28} Because the filing of appellants' present appeal complies with the time requirements of App.R. 4(A), R.C. 2505.07, and 119.12, we conclude that appellants timely perfected the present appeal. We further conclude that subject-matter jurisdiction properly lies and, therefore, appellee's motion to dismiss the instant appeal for lack of jurisdiction is denied.

{¶29} In their appeal, appellants assert a sole assignment of error for our consideration:

> The trial court committed reversible error in finding that the April 10 IEP addendum was part of [appellants' son's] stay put IEP.

{¶30} Appellants do not challenge the common pleas court's ruling concerning the school district's entitlement to records and foundational materials.

{¶31} In its cross-appeal, appellee asserts the following cross-assignment of
error:

> The common pleas court erred in finding that the state level review officer lacked authority to dismiss the special education due process request based on appellants' repeated failures to comply with the impartial hearing officer's order.

{¶32} Before addressing the merits of the appeal and cross-appeal, we consider the appropriate standard of appellate review.

{¶33} In *Tanya v. Cincinnati Bd. of Edn.* (1995), 100 Ohio App.3d 52, the First District Court of Appeals explained:

> Parents who are dissatisfied with their child's IEP are entitled to an impartial due process hearing and to further appeal to a state educational agency. Either the parents or the school district may appeal the decision of the state agency to a state court or a federal district

> court. Sections 1415(b)(2), (c) and (e)(2), Title 20, U.S.Code. A state court of common pleas hearing such an appeal must first determine whether the school district has complied with the procedural requirements of IDEA in developing the IEP; and then the court must determine whether the proposed IEP is "reasonably calculated to enable the child to receive educational benefits." *Hendrick Hudson Cent. School Dist. Bd. of Edn. v. Rowley* (1982) 458 U.S. 176, 206-207, 102 S.Ct. 3034, 3051, 73 L.Ed.2d 690, 711-713.

Id. at 55.

{¶34} Under R.C. 3323.05(F), any party aggrieved by the final order of the reviewing officer who was appointed by the state board of education "may appeal the final order within forty-five days of notification of the order to the court of common pleas of the county in which the child's school district of residence is located, under Chapter 119. of the Revised Code." See, also, Ohio Adm.Code 3301-51-08(I), effective July 1, 2002 (appeal to courts); former Ohio Adm.Code 3301-51-02(G)(16), effective February 28, 1997 (appeal to courts).

{¶35} However, just as R.C. 3323.05(F) provides a right to an aggrieved party to file an administrative appeal in a common pleas court, Section 1415(i)(2), Title 20, U.S.Code, as amended by Section 615 of the Individuals With Disabilities Improvement Act of 2004, P.L. 108-446, 118 Stat. 2647, effective July 1,

2005, also provides a right for an aggrieved party to bring a civil action.[4]

{¶36} In *Carnes v. Kemp*, 104 Ohio St.3d 629, 2004-Ohio-7107, the Supreme Court of Ohio instructed:

> In interpreting a statute, a court's principal concern is the legislative intent in enacting the statute. In order to determine that intent, a court must first look at the words of the statute itself. We are also mindful that " 'all statutes which relate to the same general subject matter must be read in pari materia.' " *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 29, quoting *Johnson's Markets, Inc. v. New Carlisle Dept. of Health* (1991), 58 Ohio St.3d 28, 35. In construing such statutes together, full application must be given to both statutes unless they are irreconcilable.

(Citations omitted.) Id. at ¶16.

{¶37} Here, the term "under Chapter 119. of the Revised Code" as used in R.C. 3323.05(F) connotes that an appeal from the final order of a state reviewing officer to the common pleas court is subject to provisions contained in R.C. Chapter 119. However, applying *Carnes*, R.C. 3323.05(F) must be considered in conjunction with Section 1415(i)(2), Title 20, U.S.Code.

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[4] The prior version of Section 1415(i)(2), Title 20, U.S.Code, which was in effect in 2002, also provided a right for an aggrieved party to bring a civil action.

{¶38} Section 1415(i)(2)(A), as amended by the Individuals With Disabilities Improvement Act of 2004, P.L. 108-446, 118 Stat. 2647, provides:

> Any party aggrieved by the findings and decision made under subsection (f) [impartial due process hearing] or (k) [placement in alternative education setting] of this section who does not have the right to an appeal under subsection (g) of this section [appeal to state educational agency], and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

{¶39} Section 1415(i)(2)(C), as amended by P.L. 108-446, provides additional requirements. Under Section 1415(i)(2)(C):

> In any action brought under this paragraph, the court –
>
> (i) shall receive the records of the administrative proceedings;
>
> (ii) shall hear additional evidence at the request of a party; and
>
> (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

{¶40} Similarly, Ohio Adm.Code 3301-51-08(I)(2), effective July 1, 2002, provides that when reviewing a decision of the SLRO, a court shall receive the records of the administrative proceedings, hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, the court shall grant relief that it deems appropriate.

{¶41} Ohio Adm.Code 3301-51-08(I)(2) is modeled after former Section 1415(i)(2)(B),[5] now Section 1415(i)(2)(C), Title 20, U.S.Code. However, the provisions of Ohio Adm.Code 3301-51-08(I)(2) that direct a reviewing court to hear additional evidence at

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[5] {¶a} In 2002, Section 1415(i)(2), Title 20, U.S.Code, provided:

{¶b} (A) In general

{¶c} Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

{¶d} (B) Additional requirements

{¶e} In any action brought under this paragraph, the court—

{¶f} (i) shall receive the records of the administrative proceedings;

{¶g} (ii) shall hear additional evidence at the request of a party; and

{¶h} (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

the request of a party and to grant relief that it deems appropriate based on the preponderance of the evidence seemingly conflict with the standard of review under R.C. 119.12 and R.C. 3323.05(F)'s provision that an aggrieved party may appeal to a common pleas court "under Chapter 119. of the Revised Code."

{¶42} Under R.C. 119.12, unless otherwise provided by law, "the court is confined to the record as certified to it by the agency." Furthermore, unless otherwise provided by law, "the court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency." R.C. 119.12 further provides that a "court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law."

{¶43} Furthermore, under R.C. Chapter 119, when reviewing the determination of a common pleas court, "[t]he appellate court is to determine only if the trial court has abused its discretion, i.e., being not merely an error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. Absent an abuse of discretion on the part of the trial court, a court of appeals may not substitute its judgment for [that of an administrative agency] or a trial court." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. Under R.C. Chapter 119, when reviewing the determination of a common pleas court, an appellate

court does, however, have plenary review of purely legal questions. *Chirila v. Ohio State Chiropractic Bd.* (2001), 145 Ohio App.3d 589, 592, citing *Steinfels v. Ohio Dept. of Commerce, Div. of Securities* (1998), 129 Ohio App.3d 800, 803.

{¶44} "When a state statute is modeled on parallel federal statutes, judicial interpretations of those federal provisions may be considered as persuasive authority in determining the meaning of comparable Ohio laws." *State v. Moore* (1994), 99 Ohio App.3d 748, 753, citing In re Estate of Morgan (1981), 65 Ohio St.2d 101, 103.

{¶45} Accordingly, applying Moore, we look to federal case law as a guide for establishing the standard of appellate review under R.C. 3323.05(F), Ohio Adm.Code 3301-51-08(I), and the IDEA.

{¶46} In *Knable v. Bexley City School Dist.* (C.A.6, 2001), 238 F.3d 755, the Sixth Circuit Court of Appeals discussed the proper standard of review in a federal forum under the IDEA as follows:

> The IDEA's provision governing federal court review of state administrative decisions states that: "In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. §1415(e)(2). The Supreme Court has construed this provision to mean that initial reviewing courts should make "independent decisions"

based on the preponderance of the evidence, but also should give "due weight" to the determinations made during the state administrative process. *See* [*Bd. of Edn. v. Rowley* (1982), 458 U.S. 176, 206, 102 S.Ct. 3034]. Although reviewing courts must not "simply adopt the state administrative findings without an independent re-examination of the evidence," *Doe v. Metropolitan Nashville Public Schools*, 133 F.3d 384, 387 (6th Cir.1998), neither may they "substitute their own notions of sound educational policy for those of the school authorities which they review," *Doe v. Bd. of Educ. of Tullahoma City Schools*, 9 F.3d 455, 458 (6th Cir.1993) (quoting *Rowley*, 458 U.S. at 206, 102 S.Ct. 3034).

According to this "modified" *de novo* standard of review, a district court is required to make findings of fact based upon a preponderance of the evidence contained in the complete record, while giving some deference to the fact findings of the administrative proceedings. *See* [*Tucker v. Calloway Cty. Bd. of Edn.* (C.A.6, 1998), 136 F.3d 495, 503]. This court, in turn, applies a clearly erroneous standard of review to the district court's findings of fact, and a *de novo* standard of review to its conclusions of law. *See id.*

Id. at 763-764.

{¶47} Accordingly, applying the standard of review in a federal forum under the IDEA as stated in *Knable*, in this appeal we review the common pleas court's findings of fact under a clearly-erroneous standard and

the common pleas court's conclusions of law under a de novo standard. Accord *Cremeans v. Fairland Local School Dist. Bd. of Edn.* (1993), 91 Ohio App.3d 668 (stating that appellate review of judicial determinations in IDEA actions is a hybrid review wherein an appellate court "must accept the common pleas court's findings of fact if they are not clearly erroneous, i.e., based upon some competent credible evidence. Accepting those facts as true, we must independently and without deference to the trial court's conclusion determine as a matter of law, i.e., de novo, whether the proposed IEPs were legally appropriate").

{¶48} In their sole assignment of error, appellants assert that the common pleas court erred by finding that the addendum of April 10, 2002, was part of their son's "stay put" IEP. Appellants contend that the IEP that is subject to the "stay put" provision is the last agreed-upon IEP prior to the disputed addendum of April 10, 2002, namely, the IEP as amended by the addendum of March 12, 2002.

{¶49} "The party challenging the terms of an IEP bears the burden of proving by a preponderance of the evidence that the IEP is the product of defective procedure or is substantively inappropriate." *Brimmer v. Traverse City Area Pub. Schools* (W.D.Mich. 1994), 872 F.Supp. 447, 449, citing *Doe v. Bd. of Edn. of Tullahoma City Schools* (C.A.6, 1993), 9 F.3d 445, 458.

{¶50} Section 1415(j), Title 20, U.S.Code requires a state agency that receives assistance under the IDEA to establish procedures that allow a child in an educational placement to remain in that placement during the pendency of proceedings conducted

pursuant to Section 1415. Generally, cases dealing with Section 1415(j), Title 20, U.S.Code can be categorized into three classes: (1) cases dealing with disciplinary expulsions of disruptive students under the IDEA, (2) cases dealing with wholesale school closings based on fiscal or other policy considerations determined by the local school board, and (3) cases dealing with adjustments to special educational services provided to an individual student. *Cavanaugh v. Grasmick* (D.Md. 1999), 75 F.Supp.2d 446, 467, fn. 27. Here, this case concerns adjustments to special educational services provided to an individual student.

{¶51} Former Section 1415(j), which was in effect in 2002, provided:

> Except as provided in subsection (k)(7) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

See, also, Section 300.514(a), Title 34, C.F.R. (providing that "[e]xcept as provided in §300.526, during the pendency of any administrative or judicial proceeding regarding a complaint under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement"); former Ohio Adm.Code

3301-51-02(G)(6)(a) (providing that, unless parents and a school district agree otherwise, a child must remain in his or her current educational placement during the pendency of any impartial due-process hearing or subsequent appeals).

{¶52} The term "placement" as used in former Section 1415(j), Title 20, U.S.Code, and Section 300.514(a), Title 34, C.F.R., is not defined in either the United States Code or the Code of Federal Regulations. See, generally, former Section 1401, Title 20, U.S.Code; Section 300.500, Title 34, C.F.R; see, also, *Thomas v. Cincinnati Bd. of Edn.* (C.A.6, 1990), 918 F.2d 618, 625 (observing that under the Education for All Handicapped Children Act, precursor to the IDEA, "[n]either the Act itself nor its accompanying regulations define the term 'placement' "). Likewise, the term "placement" as used in Chapter 3301-51 of the Ohio Administrative Code also was undefined in 2002, when this matter arose, and it remains undefined in the current version of Chapter 3301-51 of the Ohio Administrative Code. See, generally, former Ohio Adm.Code 3301-51-01, effective July 1, 1982; Ohio Adm.Code 3301-51-01, effective July 1, 2002.

{¶53} In *Thomas*, construing the Education for All Handicapped Children Act, the Sixth Circuit Court of Appeals stated:

> [T]he term "then current educational placement" must be accorded, its plain meaning. Because the term connotes preservation of the status quo, it refers to the operative placement actually functioning at the time the dispute first arises. If an IEP has been implemented, then

> that program's placement will be the one subject to the stayput provision.

Id. at 625-626. See, also, *Tennessee Dept. of Mental Health & Mental Retardation v. Paul B.* (C.A.6, 1996), 88 F.3d 1466, 1472 (stating that under the IDEA the "stay put" provision "guarantees consistency in a child's learning environment until a challenge to an existing placement or a new placement has successfully established whether a different alternative placement is necessary").

{¶54} The Sixth Circuit Court of Appeals has instructed that "one must identify a detrimental change in the elements of an educational program in order for a chance to qualify for the 'stay put' provision." Paul B., at 1474, citing *Lunceford v. D.C. Bd. of Edn.* (C.A.D.C., 1984), 745 F.2d 1577, 1582. Accord *Sherri A.D. v. Kirby* (C.A.5, 1992), 975 F.2d 193, 206 ("An educational placement, for the purposes of [Education for All Handicapped Children Act], is not changed unless a fundamental change in, or elimination of, a basic element of the educational program has occurred"). See, also, *Cavanagh*, supra, 75 F.Supp.2d at 467-468 (observing that the Third Circuit Court of Appeals' understanding of what constitutes a change in educational placement is generally consistent with the Sixth, Fifth, and D.C. Circuits and that "a fundamental change in, or elimination of a basic element of, the educational program, which adversely affects the child's learning experience in a significant way, is what constitutes a 'change in educational placement' for purposes of the IDEA"); *Brimmer*, supra, 872 F.Supp. at 452 (stating that the term "change in placement" is not defined in the IDEA or its implementing regulations and,

considering the remedial purpose of the IDEA, this term should be given "an expansive reading" and also stating that "[u]ltimately, the question whether a proposed change constitutes a change in placement, triggering procedural protections, is necessarily fact-specific").

{¶55} Thus, for a chance to qualify for the "stay put" provision, the issue is reduced to whether the addendum of April 10, 2002, constituted a fundamental change in, or elimination of, a basic element of the Stancourts' son's educational program.

{¶56} In its decision, the common pleas court found that the significance of the change reflected in the addendum of April 10, 2002, "appears to be a modification of the point reward system used to reinforce positive behavior with the ultimate goal of a complete phase out. The final section of the addendum indicates that if the target behavior is not maintained, the original IEP of January 22, 2002 will be reinstated."

{¶57} However, the common pleas court further stated:

> While undoubtedly knowledgeable about their son and highly motivated to see him continue to improve in school, the implementation of IDEA was not to give Appellants or any parents the ability to micromanage every decision made by the educational system as it regards a student. This Court does not hold itself out as a trained educator or psychologist and therefore does not find it appropriate at this juncture to determine

whether the phase out would be beneficial or detrimental to the child.

{¶58} Here, applying *Paul B.*, 88 F.3d 1466, because the common pleas court made no determination concerning whether the change reflected in the addendum of April 10, 2002, implicated a detrimental change in the elements of the Stancourts' son's educational program, or whether the change reflected in that addendum fundamentally changed or eliminated a basic element of their son's educational program, we conclude, as a matter of law, that the common pleas court erred when it found that the IHO's determination concerning the "stay put" issue was correct.

{¶59} Moreover, because the IHO made no determination concerning whether the change reflected in the addendum of April 10, 2002, implicated a detrimental change in the elements of the Stancourts' son's educational program, or whether the change reflected in that addendum fundamentally changed or eliminated a basic element of their son's educational program, we conclude, as a matter of law, that the IHO also erred when she determined that the IEP of January 2002, with that addendum, constituted their son's IEP.

{¶60} Furthermore, the reliance of the common pleas court upon Ohio Adm.Code 3301-51-01(H), effective July 1, 2002, and 3301-51-05(E)(1)(d), effective July 1, 2002, to support a view that the Stancourts' son's IEP should include the addendum of April 10, 2002, is suspect because in this case that

reliance is a retrospective application of a substantive rule.[6]

{¶61} Ohio Adm.Code 3301-51-05(E)(1)(d)(i), effective July 1, 2002, for purposes of determining when parental consent is required, defines a "change in placement" as "a change from one option on the continuum of alternative placements to another." Ohio Adm.Code 3301-51-01(H), effective July 1, 2002, upon which the common pleas court relied, defines a "continuum of alternative placements" as:

> [T]he availability of different types of educational environments, including, but not limited to
>
> (1) Regular classes;
>
> (2) Supplemental services (such as resource room or itinerant services provided in conjunction with the regular class environment);
>
> (3) Special classes;
>
> (4) Special schools;
>
> (5) Home instruction;
>
> (6) Hospitals; and

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[6] In its decision of June 4, 2004, the common pleas court stated: "If the Court looks to the Ohio Administrative Code for guidance, then OAC 3301-51-01(H) and 3301-51-05(E)(1)(d) answer the question of the stayput issue." Id. at 14.

(7) Institutions.

{¶62} However, Ohio Adm.Code 3301-51-05(E)(1)(d)(i) became effective after the April 10, 2002 addendum to the Stancourts' son's IEP was adopted by the school district and before appellants sought a due-process hearing in August 2002. See 2001-2002 Ohio Monthly Record 3026. Furthermore, the version of Ohio Adm.Code 3301-51-01(H) upon which the common pleas court relied also became effective after the April 10, 2002 addendum to the Stancourts' son's IEP was adopted by the school district and before appellants sought a due-process hearing in August 2002. Under this revision, the definition of "continuum of alternative placements" was changed.[7] See

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[7] {¶a} Former Ohio Adm.Code 3301-51-01(H), effective July 1, 1982, provided:

{¶b} "Continuum of alternative placements" means the availability of different types of educational environments, including, but not limited to:

{¶c} (1) Regular classes;

{¶d} (2) Supplemental services;

{¶e} (3) Individual/small group instruction;

{¶f} (4) Special class/learning center located in:

{¶g} (a) public school building;

{¶h} (b) A separate school in the school district;

{¶i} (c) A separate facility, such as:

2001-2002 Ohio Monthly Record 3018.

{¶ 63} Because Ohio Adm.Code 3301-51-05(E)(1)(d)(i) became effective after the April 10, 2002 addendum to the Stancourts' son's IEP was adopted by the school district and the newer version of Ohio Adm.Code 3301-51-01(H) upon which the common pleas court relied became effective after the April 10, 2002 addendum to the Stancourts' son's IEP was adopted by the school district, the common pleas court's reliance upon Ohio Adm.Code 3301-51-05(E)(1)(d)(i) and the newer version of Ohio Adm.Code 3301-51-01(H) to support its finding that the IHO did not err as to the "stay put" issue is a retrospective application of a substantive administrative rule, which undermines the rule's persuasive value as justification for the court's decision under the facts of this case. Cf. *Huntsman v. Aultman Hosp.*, 160 Ohio App.3d 196, 2005-Ohio-1482, at ¶17, quoting *State ex rel. Holdridge v. Indus. Comm.* (1967), 11 Ohio St.2d 175 (" 'in general terms, substantive law is that which creates duties, rights, and obligations, while procedural or remedial law prescribes methods or enforcement of rights or

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{¶j} (i) A county board of mental retardation and developmental disabilities facility;

{¶k} (ii) The Ohio state school for the blind or the Ohio school for the deaf; or

{¶l} (iii) A state institution operated by the Ohio department of mental health, the Ohio department of mental retardation and developmental disabilities, or the Ohio youth commission; or

{¶m} (5) Home instruction.

obtaining redress' "); Huntsman, at ¶17, quoting *Rumery v. Myles* (Aug. 8, 1983), Henry App. No. 7-83-1 ("'If the statute change is substantive, the constitution prohibits retrospective application, whereas if the statute is procedural, the statute, as amended, would apply to any cause of action before its effective date' ").

{¶64} To support its contention that the common pleas court's finding that the IHO's determination about the "stay put" issue was correct, appellee asserts that it provided adequate notice to the Stancourts about the implementation of the April 10, 2002 addendum to their son's IEP. Appellee further claims that under federal law, written parental consent is only required for implementation of an initial IEP. Moreover, because appellants did not challenge the April 10, 2002 addendum until August 2002, appellee argues that appellants' dilatory conduct caused the current dispute about the "stay put" issue. Appellants dispute appellee's claims.

{¶65} According to appellants, on April 17, 2002, in a letter dated April 13, 2002, which was sent by certified mail on April 15, 2002, appellants received notice that the April 10, 2002 addendum to their son's IEP would be implemented effective April 15, 2002. Based upon our review of the record, we find evidentiary support for appellants' claim that they did not receive notice until April 17, 2002, that the IEP addendum of April 10, 2002, would become effective April 15, 2002.

{¶66} However, despite evidentiary support for appellants' claim that they did not receive timely notice, the common pleas court made no determination concerning whether the notice comports with

requirements under the IDEA or, if the notice does not comport with requirements under the IDEA, whether this deviation resulted in substantive harm. See *McLaughlin v. Holt Pub. Schools Bd. of Edn.* (C.A.6, 2003), 320 F.3d 663, 668-669 (stating that in actions filed pursuant to the IDEA a court must determine (1) whether the state has complied with procedural requirements of the Act and (2) whether the IEP developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits); *Bd. of Edn. of Hendrick Hudson Cent. School Dist., Westchester Cty. v. Rowley* (1982), 458 U.S. 176, 206-207, 102 S.Ct. 3034; see, also, *Knable*, supra, 238 F.3d at 764 (stating that only if a court finds that a procedural violation has resulted in substantive harm, thereby constituting a denial of a free appropriate education, may relief be granted).

{¶67} Accordingly, for the reasons discussed above, we find that the common pleas court erred, as a matter of law, when it concluded that that the decision of the IHO to allow implementation of the April 10, 2002 addendum was correct and should be considered part of the Stancourts' son's IEP. Therefore, as a matter of law, we sustain appellants' sole assignment of error.

{¶68} Having sustained appellants' sole assignment of error, we also find that this matter should be remanded to the common pleas court so that it can make the requisite finding whether the change reflected in the addendum of April 10, 2002, implicated a detrimental change in the elements of the Stancourts' son's IEP, or whether the change reflected in the addendum of April 10, 2002, fundamentally changed or eliminated a basic element of the Stancourts' son's IEP, thereby implicating the "stay

put" provision of Section 1415(j), Title 20, U.S.Code. Furthermore, because the evidence suggests that the Stancourts received notice of the implementation of the April 10, 2002 addendum two days after this addendum was implemented, upon remand, as part of its inquiry, the common pleas court should also consider whether the school district complied with procedural requirements under the IDEA and, if not, whether such a deviation resulted in substantive harm.

{¶69} In its cross-appeal, appellee asserts that because appellants repeatedly failed to comply with the IHO's orders, the common pleas court erred in finding that the SLRO lacked authority to dismiss appellants' due-process-hearing request.

{¶70} Generally speaking, "[a] hearing officer has broad discretion in accepting and rejecting evidence and in conducting the hearing in general." *Crisp v. Scioto Residential Serv., Inc.*, Scioto App. No. 03CA2918, 2004-Ohio-6349, at ¶14, citing *Owens v. Adm. Ohio Bur. of Emp. Serv.* (1999), 135 Ohio App.3d 217, 220; *Nordonia Hills City School Dist. Bd. of Edn. v. Unemp. Comp. Bd. of Rev.* (1983), 11 Ohio App.3d 189, 190. Here, however, neither an evidentiary determination nor a ruling about a procedural matter in a hearing is at issue.

{¶71} In *Dressler Coal Co. v. Div. of Reclamation, Ohio Dept. of Natural Resources* (1986), 23 Ohio St.3d 131, the appellant, Dressler Coal Company, argued that a board's sua sponte dismissal of a second appeal, without a hearing, was an unconstitutional deprivation of due process. Id. at 136. Finding that the doctrine of res judicata dispensed with the

requirement of a de novo hearing, the Supreme Court of Ohio did not rule upon appellant's due-process argument. Id.

{¶72} In *Fields v. Summit Cty. Executive Branch* (1992), 83 Ohio App.3d 68, a custodial worker was terminated from his job without a hearing. The custodial worker appealed to the State Personnel Board of Review. The board adopted an administrative-law judge's report, wherein the administrative-law judge concluded that the board lacked jurisdiction over the appeal, and the board dismissed the appeal. The matter was appealed to a common pleas court, which affirmed the decision of the board. The Ninth District Court of Appeals affirmed the judgment of the common pleas court.

{¶73} Thus, *Dressler* and *Fields* support the proposition that dismissals of an administrative action without a hearing based upon res judicata and lack of jurisdiction are permissible under Ohio law. In the present case, however, the dismissals by the IHO and SLRO were not premised upon res judicata or lack of jurisdiction.

{¶74} Ohio Adm.Code 3301-51-08(F), effective July 1, 2002, outlines the responsibilities of a hearing officer and Ohio Adm.Code 3301-51-08(H)(3), effective July 1, 2002, outlines the duties of an SLRO. Cf. former Ohio Adm.Code 3301-51-02(G)(10) and 3301-51-02(G)(13)(c), effective February 28, 1997.

{¶75} Ohio Adm.Code 3301-51-08(F)(3)(d) provides that an impartial hearing officer has the responsibility of "[r]uling on procedural issues presented at the hearing." Paragraph (3)(e) of Ohio Adm.Code

3301-51-08(F) provides that an impartial hearing officer also has the responsibility of "[a]rriving at a written decision based solely on the evidence and testimony presented at the hearing and mailing such decision, by certified mail, to the parties involved and the office for exceptional children." Under Ohio Adm.Code 3301-51-08(H)(3), an SLRO shall examine the entire hearing record, ensure that the procedures at the hearing were consistent with the requirements of law, and, if necessary, seek additional evidence following the procedures outlined in Ohio Adm.Code 3301-51-08(F)(3).

{¶76} Neither Ohio Adm.Code 3301-51-08(F) nor Ohio Adm.Code 3301-51-08(H) expressly authorizes a hearing officer to dismiss an action. Cf. R.C. 119.09 (providing that a referee or examiner appointed by a state agency "shall have the same powers and authority in conducting the hearing as is granted to the agency"). See, also, *Vought Industries, Inc. v. Tracy* (1995), 72 Ohio St.3d 261, 265, quoting *State ex rel. Foster v. Evatt* (1944), 144 Ohio St. 65, paragraph eight of the syllabus (" 'There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for' ").

{¶77} However, with its requirements of notice, a hearing, and an opportunity to introduce evidence, a due-process hearing under R.C. 3323.05 and Ohio Adm.Code 3301-51-08 is a quasi-judicial proceeding. See Ohio Adm.Code 3301-51-08(F) (requiring that a hearing officer in an impartial due-process hearing inform the parties of the date, time, and location of the hearing; of a right to present evidence and cross examine; and of a right to compel the attendance of

witnesses); see, also, *State ex rel. Fern v. Cincinnati*, 161 Ohio App.3d 804, 2005-Ohio-3168, at ¶51 ("The earmarks of a quasi-judicial proceeding include requirements of notice, a hearing, and an opportunity to introduce evidence" [footnote omitted]).

{¶78} As the First District Court of Appeals held in *State ex rel. Methodist Book Concern v. Guckenberger* (1937), 57 Ohio App. 13, 16-17, affirmed, 133 Ohio St. 27:

> Judicial power consists in interpreting and applying the law by a duly authorized court to the facts involved in a contention between parties respecting their rights. * * *
>
> So it is only when there is conferred upon administrative officers the power to hear and determine controversies between the public and individuals which require a hearing resembling a judicial trial that it can be said that quasi judicial power has been conferred.

{¶79} Because a due-process hearing is quasi-judicial in nature and consists of a hearing resembling a judicial trial, we conclude that a hearing officer in such a proceeding is vested with implied powers similar to those of a court.

{¶80} The United States Supreme Court has stated:

> It has long been understood that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution," powers "which cannot be dispensed

> within a Court, because they are necessary to the exercise of all others." *United States v. Hudson,* 7 Cranch 32, 34, 3 L.Ed. 259 (1812); see also *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 764, 100 S.Ct. 2455, 2463, 65 L.Ed.2d 488 (1980) (citing *Hudson*). For this reason, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Anderson v. Dunn,* 6 Wheat. 204, 227, 5 L.Ed. 242 (1821); see also *Ex parte Robinson,* 19 Wall. 505, 510, 22 L.Ed. 205 (1874). These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.,* 370 U.S. 626, 630-631, 82 S.Ct. 1386, 1388-1389, 8 L.Ed.2d 734 (1962).

Chambers v. NASCO, Inc. (1991), 501 U.S. 32, 43, 111 S.Ct. 2123.

{¶81} Applying the reasoning of *Chambers,* we find that, unless otherwise provided by statute or administrative rule, a hearing officer in a quasi-judicial proceeding under R.C. 3323.05 and Ohio Adm.Code 3301-51-08 has implied authority to manage cases before it so as to achieve the orderly and expeditious disposition of such cases. Thus, we conclude that the common pleas court erred, as a matter of law, when it concluded that a hearing officer lacked authority to dismiss appellants' appeal.

{¶82} Under Ohio law, a court possesses discretionary power to dismiss actions as a sanction for disregarding orders or failing to prosecute. Civ.R. 41(B)(1); Jones v. Hartranft (1997), 78 Ohio St.3d 368, 371.

{¶83} "A dismissal with prejudice * * * is an extremely harsh sanction. It affects not only the suit dismissed but, because it acts as a decision on the merits, also controls questions of fact in other related cases." *Schreiner v. Karson* (1977), 52 Ohio App.2d 219, 222-223. Cf. *Christian v. McFarland* (June 20, 1997), Montgomery App. No. 15984 (concluding that a trial court's dismissal of an action without prejudice is not a final, appealable order).

{¶84} A consideration militating against dismissal with prejudice is the tenet that disposition of a case on its merits is favored in the law. *Jones*, 78 Ohio St.3d at 371; see, also, *Dornbirer v. Paul* (Aug. 19, 1997), Franklin App. No. 96APE11-1560 ("This court recognizes that disposition of cases on their merits is favored and a dismissal with prejudice is a very harsh sanction"); *Jones* at 372 ("although reviewing courts espouse an ordinary 'abuse of discretion' standard of review for dismissals with prejudice, that standard is actually heightened when reviewing decisions that forever deny a plaintiff a review of a claim's merits").

{¶85} In *Schreiner*, the court explained that "[t]he law favors deciding cases on their merits unless the conduct of a party is so negligent, irresponsible, contumacious or dilatory as to provide substantial grounds for a dismissal with prejudice for a failure to prosecute or obey a court order". Id., 52 Ohio App.2d at 223.

{¶86} Because the law favors deciding cases on their merits, *Jones,* 78 Ohio St.3d at 371, and lesser sanctions than dismissal with prejudice should be applied when possible, Schreiner at 223, we believe a hearing officer in a quasi-judicial proceeding under R.C. 3323.05 and Ohio Adm.Code 3301-51-08 should employ the sanction of dismissal with prejudice only with great circumspection and when the conduct of a party is so negligent, irresponsible, contumacious, or dilatory as to provide substantial grounds for a dismissal with prejudice. See, also, *Jones,* 78 Ohio St.3d at 372 (providing proper factors for consideration in a Civ.R. 41(B)(1) dismissal with prejudice).

{¶87} Here, the common pleas court found that "the decision to dismiss, especially with prejudice, for failure to provide discovery of the child's medical and psychological records, is unduly draconian. This is even more true in light of the nature of the administrative proceedings, which should be directed to whether a child is receiving the appropriate instructional components and settings." Under the facts and circumstances of this case, we cannot conclude that the common pleas court's finding constitutes an abuse of discretion. Neither can we conclude that the common pleas court's determination is clearly erroneous. Furthermore, we cannot conclude that the common pleas court's determination about the hearing officers' decisions to dismiss is inconsistent with the statutory purpose of the IDEA and R.C. Chapter 3323. See, generally, R.C. 3323.02; Section 1400(d), Title 20, U.S.Code; *Austintown Local School Dist. Bd. of Edn.*, 66 Ohio St.3d at 360, citing R.C. 3323.01(D) and (E), 3323.02, 3323.08(C); former Ohio Adm.Code 3301-51-02(E)(1)(d)(iv).

{¶88} Therefore, for the foregoing reasons, we overrule appellee's assignment of error on cross-appeal.

{¶89} Accordingly, having overruled appellee's motion to dismiss and its cross-assignment of error, and having sustained appellants' sole assignment of error, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas and remand this cause to that court for further proceedings, in accordance with law, and consistent with this opinion.

Motion to dismiss appeal denied; judgment affirmed in part and reversed in part, and cause remanded.

BRYANT and SADLER, JJ., concur.

APPENDIX E

COURT OF COMMON PLEAS,
FRANKLIN COUNTY, CIVIL DIVISION

No. 03CV-6746 & 03CV-12578

[Filed June 4, 2004]

WARREN AND TAMMY STANCOURT,	)
APPELLANTS.	)
VS.	)
WORTHINGTON CITY SCHOOL DISTRICT BOARD OF EDUCATION,	)
DEFENDANT.	)

JUDGE SCHNEIDER

DECISION ON THE MERITS

Entered this 3 day of ~~May~~ JUNE, 2004.

This matter is before the Court upon appeal by Warren and Tammy Stancourt on behalf of their child, from a May 12, 2003 order of a State Level Review Officer ("SLRO") Monica Bohlen. That order adopted the decision of the Impartial Hearing Officer ("IHO")

Linda Mosbacher issued February 13, 2003. The first appeal was filed on June 18, 2003. The instant refiled appeal was docketed November 14, 2003. The Court advised the parties by Judgment Entry dated April 30, 2004 that it would consider and review the matters filed under the earlier case number and the newer case number. The district then filed a Motion for an extension of time on May 6, 2004 and a Motion to Strike Matters Outside the Record, file stamped May 12, 2003. Appellants then responded on May 20, 2004 to both motions. The Court has not relied upon any matter outside the record submitted from below. The district does not have the right to file any sur-reply brief and therefore any extension requested would serve no purpose. The instant decision is based upon the record of proceedings that has been filed and the legal argument submitted by Appellants and by Appellee Worthington City School District Board of Education ("District") by way of the two merits briefs and Appellant's reply. The Court finds the motions therefore to be moot.

Appellants have brought this appeal pursuant to R.C. 3323.05 and 119.12. The Notice of Appeal sets forth three assignments of error. The first is that the SLRO and IHO erred by deciding that Appellants must provide the District with medical authorizations as to child's medical records and evaluations holding that the due process hearing will not commence until such authorizations are provided. The second assignment of error is that the decision on the issue of his stay-put placement was moot. The final assigned error is that an April 10 IEP addendum was part of his stay-put placement.

A number of facts giving rise to this matter are not in significant dispute. Appellants' child, at the time of filing, was thirteen years old and was to attend Perry Middle School for his seventh grade. He was classified as a child with a disability under the Federal Act, Individuals with Disabilities Education Act (IDEA), due to his diagnosis of having Attention Deficit Hyperactivity Disorder. He has an individual education plan (IEP) in order to help in academics and interpersonal dealings. An IEP was generated in final form, after meetings with the parents and school personnel, in January 2002 and it was then amended in February 2002 to accommodate different testing modalities. It was again amended in March 2002 and there was an additional meeting as to the structure of the IEP in April 2002. The primary disagreement was whether behavioral and social skills services were to be provided as desired by the parents or phased out, which was the District's position. The meeting was held on April 10, 2002, at which Appellant refused to sign an addendum, which included the phasing out of the behavior and social skills. Appellants were notified in writing seven days later that the change had been implemented as of April 15th.

A May 28, 2002 IEP meeting was held for establishing a new IEP for the 2002-2003 school year. The meeting was to continue on June 7, 2002. Appellants filed for a due process hearing on May 31, 2002 but then withdrew their request. The June 7th meeting was not attended by Appellants. The District did not implement a new IEP, but decided to continue with the previous IEP and its addenda. A second due process hearing was requested on August 26, 2002. Appellants asserted that the district had violated IDEA by changing his educational placement without

prior written notice and failing to provide a free appropriate public education (FAPE).

The instant action is governed by Revised Code Chapter 3323. R.C. 3323.01 provides the definitions which are employed within the Chapter. Those specifically relevant to the instant considerations include:

> "(D) "Appropriate public education" means special education and related services that:
>
> (1) Are provided at public expense and under public supervision;
>
> (2) Meet the standards of the state board of education;
>
> (3) Include an appropriate preschool, elementary, or secondary education,
>
> (4) Are provided in conformity with the individualized education program required under this chapter.
>
> (E) "Individualized education program" means a written statement for each handicapped child designed to meet the unique needs of a handicapped child, which statement shall include:
>
> (1) A statement of the present levels of educational performance of such child;
>
> (2) A statement of annual goals, including short-term instructional objectives;
>
> (3) A statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs;
>
> (4) A statement of the transition services needed for such child beginning no later than age sixteen and annually thereafter (and, when

determined appropriate for such child, beginning at age fourteen or younger), including, when appropriate, a statement of the interagency responsibilities and linkages before the student leaves the school setting;

(5) The projected date for initiation and anticipated duration of such services;

(6) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved, and whether current placement is appropriate."

Under the provisions of R.C. 3323.05, the state has mandated that there be guaranteed procedural safeguards in decisions. While the sections are lengthy, they will be repeated as follows:

"The state hoard of education shall establish procedures to assure that handicapped children and their parents are guaranteed procedural safeguards in decisions under this chapter relating to the identification, evaluation, or educational placement of a handicapped child or the provision of education or related services under this chapter.

The procedures shall include, hut need not be limited to:

(A) An opportunity for the parents to examine all relevant records with respect to identification, evaluation, or educational placement of the child, and to obtain at their own expense an independent educational evaluation of the child;

(B) Procedures to protect the rights of the child when the parents of the child are unknown or unavailable, or when the child is a ward of the state, including the assignment, in accordance with section 3323.051 [3323.05.1] of the Revised Code, of an individual to act as a surrogate for the parents;

(C) Prior written notice to the child's parents of any proposal or refusal to initiate or change the identification, evaluation, or educational placement of the child, including notice of all procedures available under this section. The state board of education may establish procedures to provide for the written acknowledgment by the parent of a notice of a child's placement or change of placement. In cases when no written acknowledgment has been obtained, notice of placement or change of placement shall be made by certified mail. A parent's acknowledgment under this division does not negate his rights to present complaints and appeal a placement decision under this section.

(D) An opportunity for the child or his parents to present complaints with respect to the identification, evaluation, or educational placement of the child, or the provision of special education under this chapter to the superintendent of the school district of the child's residence. Upon presentation of a complaint, the superintendent shall review the case, may conduct an informal hearing, and shall notify all parties of his decision. Where the child is placed in a program operated by a county board of mental retardation and developmental disabilities or other educational

agency, the superintendent shall consult with the administrator of the agency involved. Any party aggrieved by the decision of the superintendent may present a formal complaint in writing to the board of education.

(E) When a formal written complaint is received, an opportunity for the aggrieved party to receive a due process hearing conducted by an impartial hearing officer in accordance with standards and procedures adopted by the state board of education. No hearing shall be conducted by an employee of the board of education or any agency involved in the education or care of the child.

A party to a hearing under this division shall be accorded:

(1) The right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;

(2) The right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) The right to a written or electronic verbatim record of such hearing;

(4) The right to written findings of fact and decisions.

(F) An opportunity for any party aggrieved by the findings and decision rendered in a hearing under division (E) of this section to appeal within forty-five days of notification of the decision to the state board of education, which shall appoint a reviewing officer who shall review the case and issue a final order. The reviewing officer shall be appointed and shall review the case in accordance with

> standards and procedures adopted by the board. Any party aggrieved by the final order of the reviewing officer may appeal the final order within forty-five days of notification of the order to the court of common pleas of the county in which the child's school district of residence is located, under Chapter 119, of the Revised Code."

In *Smith v. Robinson,* 468 U.S. 992, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984), the Supreme Court concluded that Congress intended the EAHCA[1] to be "the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education." 104 S. Ct. at 3468. It has been held that under R.C. 3323.05, the question for the court is whether a proposed individualized educational program is adequate and appropriate for a particular child at a given point in time. *Cremeans v. Fairland Local School Dist. Bd. of Edn.*, 91 Ohio App. 3d 668, 633 N.E.2d 570 (1993). In conjunction with this consideration is the IEP. The IEP is the method by which handicapped children are guaranteed a "free appropriate public education." *Honig v. Doe* (1988), 484 U.S. 305, 311, 108 S.Ct. 592, 597-598, 98 L.Ed.2d 686, 699. The *Cremeans* case, supra, engaged in a detailed analysis of the federal legislation that was the genesis of Chapter 3323. The Court also noted the standard of review referencing *Hendrick Hudson Dist. Bd of Edn. v. Rowley* (1982), 458 U.S. 176, at 205-206, 102 S.Ct. 3034, at 3051, 73 L.Ed.2d 690, at 711-712,

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[1] Education for All Handicapped Children Act of 1975." in 1990 renamed as the "Individuals with Disabilities Education Act" ("IDEA")

emphasizing that reviewing courts should make "independent decisions" based on a preponderance of the evidence but should also give "due weight" to the state administrative proceedings The *Cremeans* Court held that in a state where review is has two levels, the Court should accord due weight to the final state administrative decision. Citing to *Thomas v. Cincinnati Bd of Edn.* (C.A.6, 1990), 918 F.2d 618, 624; *Karl v. Geneseo Central School Dist. Bd. of Edn.* (C.A.2, 1984), 736 F.2d 873, 877.

It was reiterated from the holding in *Hendrick Hudson Dist. Bd. of Edn. v. Rowley* (1982), 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690, that a court's assessment of the IEP must address both procedural guarantees and substantive goals by making the following determinations: "[A] court's inquiry in suits brought under [Section] 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." (Footnotes omitted.) *Rowley*, 458 U.S. at 206-207, 102 S.Ct. at 3051, 73 L.Ed.2d at 711-713.

Having set forth the standard and scope of review, the issues framed in this action must now be considered.

The first issue raised by Appellants is that the SLRO and IHO erred by deciding that Appellants must provide the District with medical authorizations as to Gregory's medical records and holding that the due

process hearing will not commence until such authorizations are provided. Appellants maintain that the District has no right to medical records or evaluations unless the information is intended to be offered at the hearing. 20 U.S.C. Section 1415(f)(2)(A) is similar to Ohio Administrative Code (OAC) Rule 3301-51-08(F)(1)(c). Both require disclosure of evaluations and records upon which the evaluations are based, five days prior to the hearing. OAC 3301-51-08(F)(1)(c) permits the Hearing Officer to prohibit introduction of any document not so produced. The Hearing Officer, on October 22, 2002, ordered Appellants to provide releases for records and information from physicians, psychologists, counselors, or treatment providers for the two previous years including records of Columbus Children's Hospital or Children Close to Home Center. Requests were made by the District on October 29, 2002. The District, after failing to receive executed releases, moved to dismiss the hearing on November 15, 2002. Although Appellants responded that they intended to comply, they did not. The District renewed its Motion to Dismiss on January 7, 2003. The IHO granted Appellants until January 24, 2003 to comply. An extension was requested by Appellants' counsel and January 31, 2003 was set for compliance. After attempting to call counsel for Appellants over the next two weeks, the IHO granted the motion to dismiss with prejudice citing to *Board of Education of Oak Park Public Schools,* 20 IDELR 414 (Michigan Hearing Decision, 1993) and *In Re Epsom School District,* 31 IDAELR 120 (September 16, 1999). Upon appeal to the SLRO, the dismissal was amended to be without prejudice. The SLRO decision at page seven stated that "The decision of the IHO is amended to a dismissal without prejudice, subject to reopening by

Parents after they have provided the District with all of the signed releases that have previously been furnished them." Appellants have taken the position that the only evidence that they need to produce is that which they intend to offer at the hearing, citing 20 U.S.C. 1414(f)(2)(A). Appellants offer the cases of *Alexander v. Pathfinder Schools, Inc.* (8th Cir. 1999), 189 F. 3d 735 and *Beef Nebraska* (8th Cir. 1986), 807 F. 2d 712. Appellant offer that the district has put forth no authority to condition the due process hearing upon the provision of discovery. Appellant also states that the authorization sent by the District was broader than the request proposed to the IHO and did not limit the release to two years, nor tie the records to educational evaluation. It will be noted that Exhibits B and C attached to the May 2, 2003 Reply Brief filed by Appellants and Exhibit A attached to Appellants' Brief filed August 27, 2003 appear to be copies of the release requests from the district. Appellants' contention as to the breadth of the releases is correct. They do not delineate a time period or restriction to information related to the educational component. However, the record does not show that Appellants ever sought to narrow those releases, or provide amended releases to the district. Appellants simply did not respond, even in the face of two separate motions and an order from the IHO.

The Court has found scarce guidance by statute or case law as to what discovery is permitted in the context of preparation for a due process hearing, pursuant to 20 U.S.C. 1415 or R.C. 3323. Nonetheless, reading the enabling legislation in pari materia, this Court concludes that the district is entitled to only the materials intended for use at the due process hearing as provided under 20 U.S.C. 1415(f)(2)(A) and OAC

3301-51-08(F)(1)(c). It must be kept in mind that the purpose of the due process hearing is to provide an independent review of the IEP and determine if the child is receiving an appropriate public education in consonance with the handicap presented. The proceedings should not be turned into an adversary proceeding with either side having the goal of "winning" but on the contrary, the ultimate goal is the best interests of the child. While the statutes permit the parents' inspection of the school records, it is silent as to the same right for the district (R.C. 3323 05(A))

OAC Rule 3301-51-08 sets forth the due process procedures. It includes alternative mechanisms for resolution of complaints, including case conferences, administrative reviews, mediations, and the due process hearing. The rule specifically provides the procedures for the due process hearing. At subpart (B) Impartial due process hearing, it states:

> "(1) Each school district shall provide parents, county boards of MRDD, and other educational agencies an opportunity to have an impartial due process hearing in accordance with these rules. An impartial due process hearing may be requested at any time the school district, county board of MR/DD, or other educational agency
>
> (a) Proposes to initiate or change the identification, evaluation or educational placement of the child with a disability or the provision of FAPE to the child, or
>
> (b) Refuses to initiate or change the identification, evaluation, or educational placement of the child with a disability or the provision of FAPE to the child."

The Hearing Officer at subpart (F) shall inform the parties of their rights for counsel, to present evidence and confront, cross examine, and compel the attendance of witnesses; and at (c) "Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing; At subpart (f) it is stated that the parents shall have access to all educational records of the child who is the subject of the hearing;

At part (3) (b), it mandates that that the Hearing Officer shall arrange "a disclosure conference at least five business days prior to the hearing to assure that information to be presented at the hearing is disclosed;"

At parts (4) and (5) this disclosure requirement is again addressed:

"(4) At least five business days prior to a hearing, each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(5) If any party fails to comply with paragraph (F)(4) of this rule, the hearing officer may bar that party from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party." The rule and enabling statute, as well as the federal legislation, are silent as to a right of the school to receive discovery other than the document exchange referenced above. The rule does reflect the right of the parents to educational records from the school, which would ostensibly include evaluations and assessments. While Appellants have asserted that

Alexander v. Pathfinder Schools, Inc. (8th Cir. 1999), 189 F. 3d 735 and *Beef Nebraska* (8th Cir. 1986), 807 F. 2d 712 support their position that there is no right to discovery in administrative proceedings, neither case is quite so broad. What both cases reiterate is that there in no constitutional right to discovery. Both cases affirm that, as was held in *McClelland v. Andrus,* 196 U.S. App. D.C. 371, 606 F.2d 1278, 1286 (D.C. Cir. 1979), due process mandates that discovery be provided if the failure to do so prejudices the party seeking such production. The Court concluded in *Alexander,* supra, that Ms. Alexander had in fact received discovery and had not sought additional discovery. The state Hearing Officers relied upon *Board of Education of Oak Park Public Schools,* 20 IDELR 414 and *In re Epsom School District,* 31 IDELR 120, and the District has cited *I.D. et al v. Westmoreland School District*, U.S. District Court (March 26, 1991) New Hampshire, in support of the right to dismiss for failure to provide the releases. Neither the *Oak Park,* nor *Epsom* decisions were appealed for judicial review. The *Westmoreland* case addressed allowing the school district to examine, at hearing, the file of the expert for purposes of cross-examination. In *Oak Park,* the Hearing Officer terminated the hearing, subject to reopening after the parents had provided the releases. In *Epsom,* the Hearing Officer concluded that fundamental fairness required disclosure and there was a dismissal without prejudice. In the context of a due process hearing, the District is not without evidentiary support. The district has compiled the information upon which the IEP is based. The parents may have provided other information. The district also has the opportunity to examine the material upon which the parents plan to rely upon at hearing. If a question of fundamental

fairness has been raised, the question must be answered keeping in mind the ultimate aim of IDEA, a fair and appropriate education for the handicapped child.

This Court is cognizant of the right of Hearing Officer to conduct the proceedings in the manner found appropriate and to set the parameters for evidentiary presentation. However, the decision to dismiss, especially with prejudice, for failure to provide discovery of the child's medical and psychological records, is unduly draconian. This is even more true in light of the nature of the administrative proceedings, which should be directed to the whether a child is receiving the appropriate instructional components and settings. The Court concludes that the Hearing Officer's discretion is circumscribed by the rules enacted by the legislature. The district was entitled to records to be used at the hearing by Appellants and the production was to be at least five days in advance. Failure of the parents to comply could result in barring the use of the material at hearing. While under that scenario the presentation would undoubtedly be lopsided, the Hearing Officer would still be obligated to listen to the evidence and arguments offered to determine whether the district was following FAPE as to the child. The Court does not desire to invade the province of the Hearing Officer in establishing reasonable guidelines for production of documents or reports. Some period of time prior to five days would appear contemplated as permissible under the regulations. Since the hearings are to be conducted generally within forty-five days, then a time for production inside the window of forty-five to five days would be reasonable. Further, while the releases requested in this action were unduly broad, the Court

finds that the district would be entitled to the evaluations intended to be offered at the bearing, as well as the foundational materials relied upon by any expert who would be presenting his opinion. If there is a failure to produce such discovery, then the Hearing Officer has the discretion to bar any use at the due process hearing or continue the hearing until production is made; the Hearing Officer does not have the authority to dismiss the appeal. Subject to the qualifications indicated, Appellants' assignment of error as to dismissal is well taken.

The second and third issues presented for review involve resolution of the stay put question. While the Court could find the above conclusion dispositive of the action, the issue of the stay put consideration merits attention. The statutory provision, 20 U.S.C. 1415(E)(3), if paraphrased states that if there is a challenge to a change in a child's placement, the child shall remain in his current educational placement during the pendency of the hearing. *Tennessee Dept. of Mental Health v. Paul B.* (6th Cir. 1996) 88 F. 3d 1466. However, Appellants reference 20 U.S.C. 1415(j) and maintain that the stay put should be in effect for the entirety of the proceedings, not just for the hearing. The Court finds no substantive question posed in this respect. The stay put provision should apply until there is a final resolution of the issue, which therefore would include the period after the administrative proceedings, assuming judicial review is sought.

Appellants claim that the April addendum removed all social skills services and was not part of the current educational placement. Appellants assert that the IHO erred by so concluding. The SLRO did not reach a decision on the substance of that issue.

The District references 34 CFR 300.514 and OAC 3301-51-05(E) and 3301-51-01(H) as a basis to leave the child in his or her current educational placement during the pendency of an administrative or judicial proceeding, Those regulations parallel 20 U.S.C. 1415(E)(3). The District points out that Appellants had the ability to challenge the inclusion of the April 10 addendum, but chose to not file an appeal until August, which was after the school year had ended and the next year was to begin. The Court would note that the 2003-2004 school year is about to conclude and whatever IEP is ultimately implemented will be for the 2004-2005 school year.

Appellants offer that the District did not follow the rules necessary to implement a change in the IEP because the April 10 addendum, which they declined to agree to, to was then followed with a letter received on April 17th, which informed that the addendum was implemented on the 15th. Apparently, no agreement was reached with respect to an IEP for the succeeding school year and for purposes of the instant decision, while important to the child, the issue is not before the Court.

The issue of defining what a change in placement means is not gleaned easily. There is case law which helps to clarify. The Court in *Morgan v. Chris L.* 1997 U.S. App. Lexis 1041, (January 21, 1997) cited by Appellants, defines change in placement to be a fundamental change in, or elimination of, a basic element of a child's educational program. Citing *Lunceford v. District of Columbia Board of Education,* 745 F.2d 1577, 241 U. S. App. D.C. 1. The *Tennessee Dept. of Mental Health v. Paul B.* case, supra and *Brimmer v. Traverse City,* 872 F. Supp 447 (1994)

affirm that placement may not be changed during pendency of the hearing. The due process procedures under OAC 3301-51-08 at (J) reaffirm that placement is to remain during the hearing or subsequent appeals. However, muddying the waters is the earlier statement in (A) which references disputes involving "identification, evaluation, or educational placement". Obviously, if the district were changing the child's school or entire curriculum, a change of placement would be occurring. The IHO concluded that the April 10 addendum, which would implement elimination of behavior reinforcers as warranted, was to be the then existing IEP and the stay put would include that modification. The exact language of the IHO's decision was "Based upon the foregoing, pursuant to O.A.C. 3301-51-08(J)(1), the Hearing Officer concludes that if a disputed IEP proposes to change program placement on the continuum of potential placements, then the last agreed-upon IEP is the "stay-put" placement, but if the dispute involves the provision of services only, then the disputed IEP can be the "stay-put" placement provided the school district has implemented the change pursuant to a PS-401 Prior Written Notice Form." The SLRO did not address the issue, but found that it was moot due to dismissal of the action. Since the Court has determined that dismissal was not permissible, then the issue must be determined.

If the Court looks to the Ohio Administrative Code for guidance, then OAC 3301-51-01l(H) and 3301-51-05(E)(1)(d) answer the question of the stay put issue. OAC 3301-51-01(H) states "Continuum of alternative placements" means the availability of different types of educational environments, including but not limited to

(1) Regular classes,
(2) Supplemental services (such as resource room or itinerant services provided in conjunction with the regular class environment,
(3) Special classes;
(4) Home instruction;
(5) Hospitals; and
(6) Institutions;

OAC 3301-51-05(E)(l)(d) states as to parental consent that informed parental consent must be obtained if making a change in placement of the child with a disability and at (i): "A change in placement is defined as a change from one option on the continuum of alternative placements to another;"

The primary focus of the stay put provision under federal and state law is to maintain the status quo of the child. *Cordrey v. Euckert,* 917 F.2d 1460 (6th Cir. 1990), cert denied 499 U.S. 938, 111 S.Ct. 1391 (1991); *Metropolitan Government of Nashville and Davidson County, Tenn.* 25 IDELR 594 (February 25, 1997) The *Metropolitan* case cited to *Thomas v. Cincinnati Board of Education,* supra, reiterating that the stay put provision would refer to the "operational placement actually functioning at the time the dispute first arises." *Thomas* at 626.

The heart of the parents' dissatisfaction with the April 10 addendum is the elimination of the social skills and behavior reinforcers. The IEP of January 22, 2002 included a training session by Dr. Kevin Arnold and social skills individual and group for 30 minutes

for eight weeks beginning 2/5/02 through 6/7/02.[2] The behavior plan listed in the following pages of the IEP established a point system for rewards or privileges. In a handwritten interlineations, it was noted "When mastery is reached the IEP team will he reconvened to discuss fading of reinforcers."[3] The record reflects an additional addendum dated February 8, 2002 with a change in testing. Another addendum was made in March and the disputed change was in April. The significance of the change appears to be a modification of the point reward system used to reinforce positive behavior with the ultimate goal of a complete phase out. The final section of the addendum indicates that if the target behavior is not maintained, the original IEP of January 22, 2002 will be reinstated.

While undoubtedly knowledgeable about their son and highly motivated to see him continue to improve in school, the implementation of IDEA was not to give Appellants or any parents the ability to micromanage every decision made by the educational system as it regards a student. This Court does not hold itself out as a trained educator or psychologist and therefore does not find it appropriate at this juncture to determine whether the phase out would be beneficial or detrimental to the child. While the parents have rights under IDEA, the intent of the stay put provision was to keep the status quo as to the larger setting of school and class. Changing the routine, whether agreed to by the parents or not, is not contemplated as a change of placement. Modification of the behavior

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[2] Page 6 of 1/22/02 IEP.

[3] Page 8 of 1/22/02 IEP.

plan to phase out reinforcers, if successful, is not a change of placement as connoted by a different type of educational environment, such as school or class change.

The Court does not find the decision of the IHO to be in error as to the stay put conclusion. The Court does find that dismissal of the due process hearing was an error, based upon the review of the record and the applicable law. As reflected above, the actual controversy as to behavior reinforcement may quite likely be moot. It is assumed that the school and parents will be looking for an IEP for the upcoming school year, 2004-2005. Nevertheless, on the issues raised, the Court concludes that the matter must be remanded for actions consistent with this decision.

Counsel for Appellant shall prepare a Judgment Entry pursuant to Local Rule 25.01.

/s/_____
Judge Charles A. Schneider

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APPENDIX F

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Case No.: 03 CV 12578

[Filed April 30, 2004]

WARREN AND TAMMY STANCOURT PARENTS OF GREGORY STANCOURT	)
Petitioners/Appellants	)
v.	)
WORTHINGTON CITY SCHOOL DISTRICT	)
Respondent/Appellee	)

Judge Schneider

JUDGMENT ENTRY

On June 18, 2003, Appellants filed their Notice of Appeal of an administrative decision. The case was assigned to Judge Johnson as case number 03 CV 06746. On July 29, 2003, Appellee filed its Motion to Dismiss Appellants' Appeal based on grounds that Appellants' Notice was improper. On October 31, 2003, Appellee's Motion to Dismiss was granted. Judge Johnson's Entry made clear, however, that Appellants

were in no way barred from filing a "timely, proper notice of appeal" because Appellants' time for filing their appeal never began to run. (See Judge Johnson's October 31, 2003 Entry at page 7 attached hereto). Appellants subsequently filed their timely Notice of Appeal on November 14, 2003. Upon refiling, the case was assigned a new case number: 03 CV 12578, and a new case schedule. (See case schedule for 03 CV 12578 attached hereto). On January 22, 2004, pursuant to the new case schedule, Appellants filed their Brief on the Merits, but due to a clerical error, Appellants filed their Brief under the first case number: 03 CV 06746, rather than the correct case number: 03 CV 12578. On February, 13, 2004, Appellants filed their Reply Brief, but inadvertently used the first case number again.

On April 2, 2004, Judge Schneider issued a Notice of Final, Appealable Order under the first case number: 03 CV 06746. The Court stated in its Notice that Appellants' Brief on the Merits aud Reply Brief would not be considered due to the fact that the case (03 CV 06746) had previously been terminated. At the time of Judge Schneider's April 2, 2004, Notice of Final Appealable Order, neither the Court nor Appellants were aware of the clerical error regarding the case numbers.

Accordingly, for good cause shown, this Court finds that Appellants' Brief on the Merits (filed January 2, 2004) and Reply Brief (filed February 13, 2004) were timely submitted pursuant to the 03 CV 12578 case schedule and the fact that Appellants filed their briefs under the wrong case number is harmless clerical error. This Court deems this matter to be ripe for review and will consider and review Appellants' Briefs filed in this matter.

IT IS SO ORDERED.

/s/
JUDGE SCHNEIDER 4/27/04

APPENDIX G

STATE OF OHIO
DEPARTMENT OF EDUCATION

CASE NO. SEA-1152-2002

[Filed May 12, 2003]

IN THE MATTER OF THE DUE PROCESS HEARING REGARDING:	)
GREGORY STANCOURT	)
and	)
THE WORTHINGTON CITY SCHOOLS DISTRICT	)

STATE LEVEL REVIEW OFFICER
MONICA R. BOHLEN

FINAL DECISION AND ENTRY

I. PROCEDURAL HISTORY:

This matter comes forward for State Level Review of the decision of Impartial Hearing Officer Linda F. Mosbacher pursuant to a Notice of Appeal submitted by Mr. and Mrs. Warren Stancourt, parents of Gregory Stancourt. On February 13, 2003, Hearing Officer Mosbacher (IHO) dismissed with prejudice the request

for due process hearing filed by the Stancourts (Parents) because the parents had refused to comply with an order of the IHO to sign releases submitted by the District authorizing them to obtain information from Child's private treatment providers.

On March 26, 2003, the Parents filed an appeal of the decision of the IHO, which was received by the Ohio Department of Education on March 28, 2003. An amended notice of appeal was sent and received on April 14, 2003. Both parties requested an opportunity to submit briefs and responsive briefs and Appellants sought to produce unspeified additional evidence. Said requests for the extension were granted by Order Extending Time, issued April 17, 2003.

The following documents were submitted as the record of the due process hearing and were reviewed by this state level review officer:

1. The Hearing Officer's file, consisting of pre-hearing information, correspondence, decisions on pre-trial matters and related documents;

2. Notice of Appeal and SLRO appointment letter;

Both parties submitted their appeal briefs in a timely manner. The District filed a Motion to Extend Time for Final Decision and for Leave to File a Reply Brief that was ruled on by an order denying extension of time, issued May 10, 2003.

II. FACTS:

Child, age 12 at the time the due process hearing request was filed, was a sixth grade student at a

District elementary school, the Granby Elementary School (School). He has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). Child is a disabled child, and is eligible for special education and related services due to his ADHD. As a result of his diagnosis, his ability to learn is impaired. Child is educated pursuant to an individualized education plan (IEP) and receives supplemental special educational services in a regular sixth grade classroom at the School. Child's disability causes him to have some difficulty with his academics and he benefits from verbal and auditory methods of instruction, rather than visual. He has also had problems with social skills.

At issue here were problems developing with his educational plan in the 2001-2002 school year. A brief procedural history is helpful. The relevant undisputed facts are as follows: In January of 2002, an IEP was created which, in addition to modifications in his academics, also provided that Child would receive social skills services pursuant to a behavioral plan. All parties approved of that IEP. Three addenda were added to that IEP, dated February 8, March 12, and April 10, 2002. The February 8th addendum was requested by the parents and involved testing accommodations. The March addendum involved behavioral requirements and resulted in a behavior "contract" between Child and the District. Parents objected to the IEP team's decision not to add socialization goals and objectives to the IEP. At the April 10th meeting an addendum was developed, which included a "phase out plan addendum to current behavior plan" and the Parents objected aid refused to sign the IEP.

The Parents filed a due process hearing on May 31, 2002 after another IEP meeting occurred on May 28, 2002 (planning for the next school year). The Parents dismissed that process request. The Parents filed a second time for a due process hearing on August 26, 2002 alleging that the District had both procedurally and substantively violated IDEA, in changing Child's educational placement without prior written notice and in failing to provide FAPE. The matter proceeded after the appointment of the IHO.

An issue was raised about stay-put during the due process hearing and the IHO decided on October 2, 2002, that the stay-put IEP was the January, 2002 IEP, as amended by all three amendments through April 10, 2002. A second issue arose concerning the Parents' refusal to sign releases for information as requested by the District. On October 22, 2002, the IHO ordered the parents to immediately execute a release or releases that will enable the district to obtain records and information regarding the child from "any physicians, psychologists, counselors, or other treatment providers who have evaluated, treated or consulted with the child or his parents with regard to his educational program during the last two years, including the records of individuals employed by Columbus Children's Hospital or Children Close to Home Center." The IHO further indicated in her order that the proposed language of the release provided by the district in this motion is one example of a release that would satisfy her order. The District then submitted a number of releases to Parents on October 29, 2002, that included the exact language contained in its motion that was specifically approved by the hearing officer in her order.

When the Parents did not comply, the District filed a motion to dismiss on November 15, 2002, served on the Parents, seeking an order of dismissal with prejudice for the violation of the release order and, in the alternative, for an order excluding the Parents from producing evidence related to any private treatment providers who have evaluated, counseled or treated Child. On or about December 13, 2002, Parents responded to the District's IHO on several pending issues, including the records issue, stating "Our response to the district's motion to dismiss is - as we will now be granting the district access to the information they have requested, we believe this motion to be moot." Despite that statement in their pleading, Parents did not provide the District with the requested releases.

On January 7, 2003, the School District supplemented its motion to dismiss, again delineating efforts taken to obtain the releases and asking that the signed releases be signed by January 22, 2003, or that the case be dismissed with prejudice. The IHO granted the Parents until January 24, 2003 to respond to the District's January 7, 2003 supplemental motion. Parents had up until this time been proceeding without counsel. On January 23, 2003, the IHO was contacted by phone by an attorney purporting to represent the Parents who requested additional time to respond and the IHO set a deadline of January 31, 2003 for his response. On January 23rd, the IHO informed the Parents of this extension. The IHO received no response by January 31st and after two more weeks during which she called Parents' new counsel on two occasions to inquire as to the status of the matter and the calls were not returned, the IHO granted the District's motion to dismiss, dismissing

the case with prejudice, relying on *Board of Education of Oak Park Public Schools*, 20 IDELR 414 (Michigan Hearing Decision 1993) and *In Re Epsom School District*, 31 IDELR 120 (September 16, 1999).

III. PARENTS' ARGUMENT:

The Parents assert two (2) assigmnents of error in their amended notice of appeal summarized as follows: (1) The IHO improperly and prematurely dismissed the action with prejudice and without notice to the Parents, in violation of state and federal law; (2) The IHO erred when she ruled in favor of the District regarding stay-put despite strong evidence that the Parents did not receive prior written notice before the District's unilateral implementation of the IEP she found to be the stay-put.

IV. DECISION:

The central issue presented by this case is whether the IHO erred in dismissing the case with prejudice prior to conduciing the due process hearing. The IHO's dismissal terminated the stay-put issue as the stay-put issue is only an issue during the pendency of a due process hearing so that issue is now moot.

The IHO has discretion to conduct the hearing, including all pre-trial matters as she chooses to do so within the confines of the enabling statutes. This includes the right to dismiss cases where warranted. The IHO carefully delineated the actions leading up to her dismissal of the case. Parents argue that the dismissal was without notice to them. This argument is not supported by the facts. Parents had notice by the clear wording of the District's two motions, filed

approximately two months apart, which sought dismissals with prejudice due to Parents lack of compliance with the order on the release. The IHO's order was crystal clear. Parents were to sign the releases submitted immediately.[1] Between the filing of the two motions. Parents responded and raised no objections to the releases; instead, they indicated they were going to sign them. The IHO was at no time after her order presented with any objection by Parents to the order, just their non-compliance. The IHO was not required to separately notify the Parents that their case could be dismissed if they did not respond to the motion or comply with the order, although the hearing officer did include a warning in her October 22, 2002 order that the dismissal motion could be renewed and Parents given an opportunity to respond should Parents not comply with the order.

According to the case law, the IHO had authority to dismiss the case, but the dismissal *with prejudice* was unduly harsh. *Board of Education of Oak Park Public Schools*, 20 IDELR 414 (Michigan Hearing Decision, 1993); *In Re Epsom School District*, 31 IDELR 120 (September 16, 1999). In *Oak Park*, the hearing officer dismissed the case without prejudice after two direct warnings to the Parents that the case would be dismissed if records were not produced and Parents persisted in non-compliance. In *Epsom*, the IHO dismissed the case without prejudice after notifying the Parents that a failure to comply with the signing of releases would result in a dismissal, but in an effort to "assure the drastic remedy of dismissing the hearing

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[1] Defined by *Black's Law Dictionary* as "present; at once; without delay; not deferred by any interval of time."

does not unfairly impact" the Child, the IHO outlined reasonable conditions for reopening the case.

Ohio law is in accord as it is well-established that a decision to dismiss a civil case is within the sound discretion of the trial court, even to dismiss a case with prejudice where the conduct of a party is so "negligent, irresponsible, contumacious or dilatory as to provide substantial grounds for a dismissal with prejudice for a failure to . . . obey a court order." *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 684 N.E.2d 319, quoting *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 632 605 N.E. 2d 936, 944. Dismissals with prejudice are not favored, and courts are generally encouraged to consider lesser sanctions before dismissing a case with prejudice. *Sazima v. Chalko* (1999), 86 Ohio St.3d 151, 712 N.E.2d 729. A dismissal with prejudice is a drastic remedy particularly where the issue is one of whether a child is receiving a FAPE.

The decision of the IHO is amended to a dismissal without prejudice, subject to reopening by Parents after they have provided the District with all of the signed releases that have previously been furnished them.[2] Due to the statutory timelines the request to reopen should be filed in the same manner as the original request for a due process hearing and shall advise that the condition of reopening has been met. At such time as that occurs, the case should then be referred back to the originally assigned IHO if possible and all unresolved issues from the original proceeding

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[2] The acceptable release form is the one identified as Exhibit C on Parents' Reply Brief.

remain for resolution in the due process hearing as if the case had not been dismissed. This decision does not stay any applicable statutes of limitations.

V. CONCLUSION:

In conclusion, the IHO did not err in dismissing the case, but she did err in dismissing it with prejudice. Parents may reopen the case at such time as they have complied with the condition of tendering to the District all of the signed releases that have already been furnished to them and have filed to reopen the case in the same manner required for the filing of request for due process hearings.

/s/ Monica R. Bohlen
Monica R. Bohlen 0017983
State Level Review Officer
1520 URS Tower
36 East Seventh Street
Cincinnati, OH 45202
(513) 621-6556

* * *

APPENDIX H

STATE OF OHIO
DEPARTMENT OF EDUCATION

Case No. SE-1152-2002

[Dated February 13, 2003]

In the Matter of:	)
Impartial Due Process Hearing	)
on Behalf of Gregory Stancourt	)
	)
Mr. and Mrs. Warren Stancourt	)
Parents of Gregory Stancourt	)
Petitioners,	)
	)
and	)
	)
The Worthington City Schools District	)
Respondent.	)
	)

DECISION

This matter is before the Hearing Officer on the Worthington City School District's (hereinafter, "School District's") motion to dismiss the hearing with prejudice due to failure of the Stancourts (hereinafter, "Parents") to comply with the Hearing Officer's October 22, 2002 order for release of records. The Parents have alleged that the School District failed to provide FAPE to Gregory (hereinafter, "Child") during

the 2001-02 school year due to procedural and substantive violations of IDEA. For reasons more fully set forth below, the motion is granted.

On October 15, 2002, the School District filed a motion asking the Hearing Officer to order the parents to consent to the release of the Child's records from Columbus Children's Hospital and Children's Close to Home Center. On October 22, 2002, the motion was granted by the Hearing Officer. The Hearing Officer also ordered the School District to release the records of the School District's expert, Dr. Kevin Arnold, to the Parents upon their request, if such a request was made.

The School District subsequently sent release to the Parents. The Parents did not execute the releases, and on November 18, 2002, the School District filed a motion requesting that the Hearing Officer order this hearing to be dismissed with prejudice.

On November 18, 2002, the School District also filed a motion for an observation of the child by their expert, Dr. Arnold. The Parents have refused their consent unless their expert, Dr. Hatcher, simultaneously observes the Child.

On or about December 13, 2002, the Parents responded to the School District's November 18, 2002 motions with a pleading in which the Parents state: "Our response to the district's motion to dismiss is - as we will now be granting the district access to the information they have requested, we believe this motion to be moot."

Despite the statement in the Parents' pleading, the Parents again did not provide the School District with the necessary releases.

On January 7, 2003, the School District supplemented it's motion to dismiss. Included in the supplement was a letter to the Parents providing additional releases and asking that the signed releases be received by January 22, 2003, or that this matter be dismissed with prejudice.

The Hearing Officer granted the Parents until January 24, 2003, to responded to the School District's January 7, 2002 supplemental motions.

At the request of the Parents, the School District executed a release for the records of Dr. Arnold on January 21, 2003.

On January 23, 2003, the Hearing Officer received a telephone call from attorney Dan Smith. Mr. Smith stated that he had just been retained by the Parents. He requested that he be permitted additional time to respond to the School District's motions. The Hearing Officer set a deadline of January 31, 2003, for the Parents' response. Attorney Smith stated that this would allow him sufficient time to prepare a response. The Hearing Officer also confirmed this with the Parents by telephone on January 23, 2003.

The Hearing Officer had received nothing from attorney Smith as of February 13, 2003. In the interim, the Hearing Officer made two telephone calls to attorney Smith's office (on February 4 and February 11, 2003), inquiring as to the status of the matter. The calls were not returned.

As of February 13, 2003, the Parents had not given the School District their consent for the release of the Child's records.

In Board of Education of Oak Park Public Schools, 20 IDELR 414 (Michigan Hearing Decision, 1993), a hearing officer dismissed a due process hearing requested by a parent when the parents refused to provide the school district with the child's psychological evaluation and treatment information. The hearing officer found that the parents had "denied the district the opportunity to properly prepare for the hearing as well as present possibly relevant testimony concerning the issue in dispute." Similarly, in 1999, a special education hearing officer in New Hampshire also dismissed a hearing request because the parents refused to release records requested by the school district that were needed for hearing preparation. In Re Epsom School District, 31 IDELR 120 (September 16, 1999).

On the basis of the foregoing, this case is hereby dismissed with prejudice. Such a dismissal does not limit the Parents' rights as to future issue that may occur with regard to the child's educational program.

Due to the dismissal, the School District's motion for observation by expert is moot.

2/13/03
Date

/s/
Linda F. Mosbacher
Impartial Hearing Officer

* * *

APPENDIX I

STATE OF OHIO
DEPARTMENT OF EDUCATION

Case No. SE-1152-2002

[Dated October 22, 2002]

In the Matter of:	)
Impartial Due Process Hearing	)
on Behalf of Gregory Stancourt	)
	)
Mr. and Mrs. Warren Stancourt	)
Parents of Gregory Stancourt	)
Petitioners,	)
	)
and	)
	)
The Worthington City School District	)
Respondent.	)
	)

DECISION

This matter is before the Hearing Officer on the Worthington City School District's (hereinafter, "school district's") motion for release of records. The school district has requested that Mr. and Mrs. Stancourt (hereinafter, "parents") release the records of Columbus Children's Hospital and Children's Close to Home Center pertaining to their twelve-year-old son, Gregory Stancourt (hereinafter, "child"). The parents

have declined, asserting the patient-physician privilege.

The child, who has been diagnosed with ADHD, attends and receives supplemental special education services in a regular sixth grade classroom at Granby Elementary School in the school district. The child has been receiving services under "stay-put" pursuant to an IEP dated January 22, 2002, and three addendum, dated February 8, March 12, and April 10, 2002. At issue is a proposed IEP written in June, 2002. The parents have filed this due process request on the basis that the June, 2002 IEP does not provide FAPE for the child.

Ohio Administrative Code 3301-51-08(F)(1)(f) provides that each party to a due process hearing has the right to have access to all educational records of the child who is the subject of the hearing. The school district is requesting that the parents provide it with releases to obtain records and information regarding the child from "any physicians, psychologists, counselors, or other treatment providers who have evaluated, treated or consulted with the child or his parents with regard to his educational program during the last two years."

Because certain individuals affiliated with Columbus Children's Hospital or Children's Close to Home Center have had input in the completion of the child's past IEPs, and because the parents seek to have these individuals' input considered when the Hearing Officer determines FAPE for the child, their records could be considered educational records and subject to discovery by the school district. In such a case, privilege would be considered waived by the parents.

Board of Education of Oak Park Public Schools, 20 IDELR 414 (Michigan Hearing Decision, 1993).

This request is reasonable and comports with the law, which provides for the release of all educational records. If the parents were to make a similar request with regard to the records of the school district's expert, Dr. Kevin Arnold, the Hearing Officer would likewise find the request to be reasonable and order such a release (if the school district were to refuse, which it has not).

The school district has also requested that it be provided with 30 days prior to the hearing to review the records. This request is also reasonable.

Therefore, the Hearing Officer Orders that the parents immediately execute a release or releases that will enable the school district to obtain records and information regarding the child from "any physicians, psychologists, counselors, or other treatment providers who have evaluated, treated or consulted with the child or his parents with regard to his educational program during the last two years," including the records of individuals employed by Columbus Children's Hospital or Children's Close to Home Center. The proposed language of the release provided by the district in this motion is one example of a release that would satisfy this Order.

The school district has also moved to have this case dismissed or the aforementioned evidence barred if the parents refuse to comply with an order to execute a release. The Hearing Officer will defer ruling on that part of the school district's motion at this time, with the understanding that it can be renewed, and the

parents given opportunity to respond, should circumstances dictate.

10/22/02
Date

/s/
Linda F. Mosbacher
Impartial Hearing Officer

APPENDIX J

STATE OF OHIO
DEPARTMENT OF EDUCATION

Case No. SE-1152-2002

[Dated October 2, 2002]

In the Matter of:	)
Impartial Due Process Hearing	)
on Behalf of Gregory Stancourt	)
	)
Mr. and Mrs. Warren Stancourt	)
Parents of Gregory Stancourt	)
Petitioners,	)
	)
and	)
	)
The Worthington City Schools District	)
Respondent.	)
	)

DECISION

This matter is before the Hearing Officer on Mr. and Mrs. Stancourt's (hereinafter, "parents") request for a determination of the "stay-put" placement for their twelve-year-old son, Gregory Stancourt (hereinafter, "child").

The child, who has been diagnosed with ADHD, attends and receives supplemental special education

services in a regular sixth grade classroom at Granby Elementary School in the Worthington City School District (hereinafter, "school district"). The child has been receiving services pursuant to an IEP dated January 22, 2002, and three addendum, dated February 8, March 12, and April 10, 2002. The February, March, and April addendum all changed delivery of services but not program placement. The parents refused to sign the April addenda. The April addenda involved a phase-out of the child's behavioral plan.

The school district implemented a phase-out of the behavioral plan as set forth in the April addenda pursuant to a PS-401 Prior Written Notice Form to comply with 34 CFR 300.503 and 300.504. The parents filed a due process request on May 31, 2002. The parents withdrew the due process hearing request on June 28, 2002. The parents renewed their due process request on August 26, 2002.

The IEP form provides a parent with three options in the form of three boxes which can be checked as follows:

1. I give consent to initiate special educational and related services specified in this IEP.

2. I give consent to initiate special education and related services specified in this IEP except (a blank line is provided).

3. I do not give consent for special education services at this time.

A parent actually has four choices regarding placement when asked to sign an IEP. Two give consent and two do not. Refusing to sign the IEP would be the fourth option. This is what the parents did.

The parents argue that stay put is the January, 2002 IEP with the service changes provided in the February and March addenda only. The school district argues that stay put is the January, 2002 IEP with the service changes provided in all three addenda.

Ohio Administrative Code 3301-51-08(J)(1), as amended on July 1, 2002, provides as follows: Except as provided in paragraph (K) of rule 3301-51-05 of the Administrative Code during the pendency of any impartial due process hearing or subsequent appeals, unless the parents and the school district agree otherwise, the child involved in the complaint must remain in his or her current educational placement."

O.A.C. 3301-51-08(J)(1) (emphasis added). Ohio Administrative Code 3301-52-08(5)(4) also refers to "change of placement."

In School Committee of the Town or Burlington v. Department of Education of Massachusetts et al. (1985), 471 U.S. 359 the U.S. Supreme Court reviewed the issue of the interim placement of a child during due process. The Court also addressed the issue of "stay-put" in Hoenig v. Doe, et al. (1988), 484 U.S. 305. Both cases emphasized the importance of parental participation in the development of the IEP, and the right of the child to remain in his or her then current educational placement in the event of a due process request. In Hoenig, the Court specifically notes that: "(t)he "stay-put" provision at issue in this case governs

the placement of a child while these often lengthy review procedures run their course." Hoenig, supra, at paragraph 19.

Based on the foregoing, pursuant to O.A.C. 3301-51-08(J)(1), the Hearing Officer concludes that if a disputed IEP proposes to change program placement on the continuum of potential placements, then the last agreed-upon IEP is the "stay-put" placement, but if the dispute involves the provision of services only, then the disputed IEP can be the "stay-put" placement provided the school district has implemented the change pursuant to a PS-401 Prior Written Notice Form.

For reasons set forth herein, the Hearing Officer holds the child's "stay put" placement is his current education placement as set forth in the January, 2002 IEP and the service changes provided in the February, March, and April addendum.

10/2/02
Date

/s/
Linda F. Mosbacher
Impartial Hearing Officer

APPENDIX K

IN THE SUPREME COURT OF OHIO

No. 2008-2076

[Filed February 4, 2009]

Warren and Tammy Stancourt, Parents of Gregory Stancourt	)
	)
v.	)
	)
The Worthington City School District	)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.

(Franklin County Court of Appeals; Nos. 07AP835 and 07AP836)

THOMAS J. MOYER
Chief Justice

Supreme Court, U.S.
FILED
JUN 8 - 2009
OFFICE OF THE CLERK

No. 08-1373

IN THE
Supreme Court of the United States

WARREN STANCOURT, *et ux.*, Parents of
GREGORY STANCOURT,

Petitioners,

v.

WORTHINGTON CITY SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the parents' receipt of prior written notice two days after the gradual thinning of reinforcers in their son's behavior plan began is actionable under the Individuals with Disabilities Education Act when no harm resulted from that technical procedural violation.

II. Whether the thinning of behavioral reinforcers over a period of time, with the immediate reinstatement of those reinforcers if the student's behavior lapses, constitutes a change in placement under the stay put provision of the Individuals with Disabilities Education Act when such thinning was contemplated by the behavior plan developed with the parents' input and agreed to by the parents.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
INTRODUCTION	1
RELEVANT STATUTES AND REGULATIONS	3
STATEMENT OF THE CASE AND RELEVANT FACTS	10
REASONS FOR DENYING THE PETITION	15
I. THE OPINION OF THE TENTH APPELLATE DISTRICT COURT COMPORTS WITH THE SCOPE AND THE INTENT OF THE IDEA, THE DECISIONS OF THIS COURT AND THE STANDARD APPLIED BY THE FEDERAL CIRCUIT COURTS.	15
A. The Sixth Circuit's Limitation that a Procedural Violation is Only Actionable if it Causes Substantive Harm Does Not Conflict with the Standard Applied by Any Other Circuit.	17

Contents

Page

B. Congress Expressly Limited Actionable Procedural Violations to Those that Result in Actual Harm. . 24

II. THE COURT SHOULD DEFER TO CONGRESS, THE UNITED STATES DEPARTMENT OF EDUCATION AND THE OHIO DEPARTMENT OF EDUCATION AND REFUSE TO DEFINE "EDUCATIONAL PLACEMENT". 25

CONCLUSION 31

TABLE OF CITED AUTHORITIES

Page

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Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804 (5th Cir. 2003) 21

AW, ex rel. Wilson, v. Fairfax County Sch. Bd., 372 F.3d 674 (4th Cir. 2004) 26

Board of Educ. v. Illinois State Bd. of Educ., 103 F.3d 545 (7th Cir. 1996) 26-27

Board of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley, 458 U.S. 176 (1982) ..... *passim*

Brimmer v. Traverse City Area Pub. Schs., 872 F. Supp. 447 (D.C. Mich. 1994) 27

Burke County Bd. of Educ. v. Denton, 895 F.2d 973 (4th Cir. 1990) 16

Burlington Sch. Comm. v. Massachusetts Dept. of Educ., 471 U.S. 359 (1985) 26, 29

Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186 (2nd Cir. 2005) 22

Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990), *cert. denied*, 499 U.S. 938 (1991) 17

Cited Authorities

Page

DeLeon v. Susquehanna Comm. Sch. Dist., 747 F.2d 149 (3rd Cir. 1984) 27

DiBuo v. Board of Educ., 309 F.3d 184 (4th Cir. 2002) 21

Doe v. Alabama State Dept. of Educ., 915 F.2d 651 (11th Cir. 1990) 16, 20, 23

Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990) 21-22

Dong v. Board of Educ. of Rochester Comm. Schs., 197 F.3d 793 (6th Cir. 1999) 17, 18

G.N., ex rel. J.N., v. Board of Educ. of the Twnshp. of Livingston, 309 Fed. Appx. 542, 2009 U.S. App. LEXIS 2455 (3rd Cir. Feb. 4, 2009) 22

Hall v. Vance County Bd. of Educ., 774 F.2d 629 (4th Cir. 1985) 20, 21

Hjortness v. Neenah Joint Sch. Dist., 507 F.3d 1060 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 2962, 171 L.Ed. 2d 906 (2008) 22

Honig v. Doe, 484 U.S. 305 (1988) 27, 29

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) .. 29

Cited Authorities

Page

Jackson v. Franklin County Sch. Bd., 806 F.2d 623 (5th Cir. 1986) 20, 21

Knable v. Bexley City Sch. Dist., 238 F.3d 755 (6th Cir. 2001), *cert. denied*, 533 U.S. 950 (2001) 17, 18, 25

Lesesne v. District of Columbia, 447 F.3d 828 (D.C. Cir. 2006) 22

Lindahl v. Office of Pers. Mgmt., 470 U.S. 768 (1985) 27

Logue v. Unified Sch. Dist. No. 512, Shawnee Mission, 153 F.3d 727 (table), 1998 U.S. App. LEXIS 16280 (10th Cir. 1998) 23

Lunceford v. District of Columbia Bd. of Educ., 745 F.2d 1577 (D.C. Cir. 1984) 28, 30

Metropolitan Bd. of Pub. Educ. v. Guest, 193 F.3d 457 (6th Cir. 1999) 17

Roland M. v. Concord Sch. Comm., 910 F.2d 983 (1st Cir. 1990) (*en banc*), *cert. denied*, 499 U.S. 912 (1991) 22, 23

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) 29

Cited Authorities

Page

Sherri A.D. v. Kirby, 975 F.2d 193 (5th Cir. 1992) 28

Speilberg v. Henrico County Pub. Schs., 853 F.2d 256 (4th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989) 21

Stringer v. St. James R-1 Sch. Dist., 446 F.3d 799 (8th Cir. 2006) 22

Tennessee Dept. of Mental Health and Mental Retardation v. Paul B., 88 F.3d 1466 (6th Cir. 1996) 28

Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618 (6th Cir. 1990) 16, 26, 29

Tice v. Botetourt County Sch. Bd., 908 F.2d 1200 (4th Cir. 1990) 21

Union Sch. Dist. v. Smith, 15 F.3d 1519 (9th Cir. 1994), *cert. denied*, 513 U.S. 965 (1994) 17

W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23, 960 F.2d 1479 (9th Cir. 1992) .. *passim*

Winkelman v. Parma City Sch. Dist., 550 U.S. 516 (2007) 24-25

Cited Authorities

Page

STATUTES

Individuals with Disabilities Education Act, Title 20, U.S. Code, Pub. L. No. 105-17, 111 Stat. 37 (1997) 1, 3

Individuals with Disabilities Education Act, Title 20, U.S. Code, Pub. L. 108-446, 118 Stat. 2647 (2004) 5, 24, 26

20 U.S.C. §1415(a) 3, 5, 28

20 U.S.C. §1415(f)(3)(E)(i) 22

20 U.S.C. §1415(f)(3)(E)(ii) 6, 22, 24, 25

20 U.S.C. §1415(j), Title 20, U.S. Code, Pub. L. 105-17, 111 Stat. 37, 93 (1997) 3, 25, 26

20 U.S.C. §1415(j), as amended 6, 26

REGULATIONS

34 C.F.R. §300.116 ..... 7, 27

34 C.F.R. §300.514 ..... 4, 27

34 C.F.R. §300.518 ..... 8, 27

Ohio Admin. Code §3301-51-02(G)(6)(a) 5, 28

Cited Authorities

Page

GUIDANCE

71 Fed. Reg. 46588 (2006) 27, 28

71 Fed. Reg. 46589 (2006) 28

INTRODUCTION

Petitioners have presented no compelling reason for which the Court should grant their Petition for a Writ of Certiorari ("Petition"). Specifically, Petitioners have failed to demonstrate that the September 9, 2008 Opinion of Ohio's Tenth Appellate District Court conflicts with a decision of this Court or any other federal court nor have they shown that the Tenth Appellate District decided an important question of federal law in a way that should be settled by this Court. In reaching its decision, the Tenth Appellate District evaluated and interpreted the formerly-effective version of the IDEA, Title 20, U.S. Code, Pub. L. No. 105-17, 111 Stat. 37 (1997), its attendant Regulations, and Ohio's then-effective Administrative Code.

Petitioners contend that the Sixth Circuit Court of Appeals' standard, requiring a showing of substantive harm for a procedural violation of the Individuals with Disabilities Education Act ("IDEA" or "the Act") to be actionable, is in direct conflict with the standard utilized by the Fourth and Fifth Federal Circuit courts, which allegedly deem procedural irregularities per se violations of the Act. The Tenth Appellate District relied on the Sixth Circuit's standard in ruling for the Respondents. Petitioners' argument ignores more recent rulings of the Fourth and Fifth Circuits which soundly reject the concept of per se violations and, instead, evaluate whether actual harm existed in the face of a procedural violation under the Act. The remaining federal circuit courts have determined that a procedural violation is only actionable when harm to either the student or the parents' opportunity to

participate in the development of the IEP has actually occurred in connection with that violation. Further, the standard applied by the Tenth Appellate District comports with this Court's decision establishing a two-part inquiry – one procedural and the other substantive – in evaluating whether the Act has been violated.

In its 2004 re-authorization of the IDEA, Congress incorporated the requirement that a procedural violation result in harm for it to be actionable. There is no question that harm is a necessary element.

Petitioners also assert that the Court should define "educational placement" under the IDEA as it relates to the Act's stay put provision because the phrase is not defined in the Act or its attendant regulations. Despite revisiting the Act sixteen times in the last twenty years, Congress has not elected to define "educational placement." The United States Department of Education ("DOE"), the Ohio Department of Education ("ODE"), and Ohio's General Assembly have likewise left the phrase undefined. This Court should not define the phrase "educational placement" under these circumstances. Rather, the plain meaning of the statutory provision provides sufficient guidance.

There is no great or general public interest at stake here. Rather, this matter concerns only Petitioners' private disagreement with the Tenth Appellate District's decisions, which are legally and factually correct. Furthermore, the substantive merits of Petitioners' position have never been addressed since the impartial due process hearing requested by

Petitioners to determine whether their son has been accorded a free appropriate public education ("FAPE") has not yet occurred. Despite the passing of nearly seven years, the case is not yet ripe for this Court's review. Petitioners have failed to sustain their burden of demonstrating any compelling reasons for this Court to grant the Petition, and it should be denied accordingly.

RELEVANT STATUTES AND REGULATIONS

The following portions of the former Individuals with Disabilities Education Act, Title 20, U.S. Code, Pub. L. No. 105-17, 111 Stat. 37 (1997), the Department of Education's formerly-effective Regulations, and Ohio's formerly-effective Administrative Code are relevant to this matter:

20 U.S.C. §1415(a) - Establishment of procedures

> Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

20 U.S.C. §1415(j) - Maintenance of current educational placement

> Except as provided in subsection (k)(7) of this section, during the pendency of any

proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

34 C.F.R. §300.514 - Child's status during proceedings

(a) Except as provided in §300.526, during the pendency of any administrative or judicial proceeding regarding a complaint under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.

(c) If the decision of a hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section.

Ohio Admin. Code §3301-51-02(G)(6)(a) - During the pendency of any impartial due process hearing or subsequent appeals, unless the parent and the school district agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

The following portions of the currently-effective Individuals with Disabilities Education Act, Title 20, U.S. Code, Pub. L. 108-446, 118 Stat. 2647 (2004), amending 20 U.S.C. §§1400 *et seq.*, and the Department of Education's Regulations implementing that law are also relevant to Respondent's arguments opposing the Petition:

20 U.S.C. §1415(a) - Establishment of procedures

> Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

20 U.S.C. §1415(f)(3)(E)(ii)- Impartial Due Process Hearing

(3) Limitations on hearing

(E) Decision of hearing officer

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies –

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

20 U.S.C. §1415(j) - Maintenance of current educational placement

Except as provided in subsection (k)(4) of this section, during the pendency of any proceedings conducted pursuant to this

section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

34 C.F.R. §300.116 – Placements

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that –

(a) The placement decision –

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(2) Is made in conformity with the LRE provisions of this subpart, including §§300.114 through 300.118;

(b) The child's placement –

(1) Is determined at least annually;

(2) Is based on the child's IEP; and

(3) Is as close as possible to the child's home;

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

34 C.F.R. §300.518- Child's status during proceedings

(a) Except as provided in §300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.

(c) If the complaint involves an application for initial services under this part from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned three, the public agency is not required to provide Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services under §300.300(b), then the public agency must provide those special education and related services that are not in dispute between the parent and the public agency.

(d) If the hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for purposes of paragraph (a) of this section.

STATEMENT OF THE CASE AND RELEVANT FACTS

In January of 2002, Petitioners Warren and Tammy Stancourt (also "the Stancourts") participated in the creation of an individualized education program ("IEP") for their son, Gregory Stancourt, to be implemented at Respondent Worthington City School District (also "the School District"). (Pet. App. at 3a)[1] The January 22, 2002 IEP, with the agreement of the Stancourts, established annual educational goals and objectives for their son and also contained a behavior plan that identified the following objectives for Gregory: 1) completing and turning in assignments within the allotted time; 2) refraining from touching others by keeping his hands and feet to himself; 3) completing work neatly; 4) increasing the duration of time he is on task; and 5) working without vocalizations. (Pet. App. at 4a) The behavior plan established a point system under which Gregory earned and lost points depending on his targeted behavior during the instructional periods of his school day. (*Id.*) The behavior plan also provided that, if Gregory earned eighty percent of the available points for two consecutive weeks, the targeted behaviors would be considered mastered, and the IEP team would reconvene to discuss the fading of the behavioral reinforcers. (Pet. App. at 5a)

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1. The September 9, 2008 Opinion of the Tenth Appellate District Court accurately recites the procedural and factual bases underlying the Stancourts' Petition. Therefore, Respondent's citations to Petitioners' Appendix herein are directed to the text of that Opinion.

School District officials met with the Stancourts on April 10, 2002 and proposed an addendum which called for the thinning of the behavioral reinforcers because Gregory had earned eighty percent of the total available points under the behavioral plan for two consecutive weeks. (Pet. App. at 5a) The April 10th addendum specifically provided for a gradual reduction in the number of points available to Gregory, a reduction of the frequency of reinforcers for the performance of targeted behaviors, and the eventual elimination of the behavior plan. (*Id.*) The April 10 addendum also stated that the January 22, 2002 behavior plan would be reinstated if Gregory did not maintain the targeted behaviors with intermittent reinforcement. (*Id.*) The Stancourts refused to sign the addendum, requesting time to read, consider and discuss it with Gregory's psychologist. (*Id.*) On April 13, 2002, the School District issued a Written Notice to Parents notifying the Stancourts that the April 10th addendum would take effect on Monday, April 15, 2002 and informing them of the procedural safeguards available to them under the Act. (Pet. App. at 6a) The Stancourts claim to have received the Notice on April 17, 2002 and presently contest the School District's implementation of the April 10th addendum prior to their receipt of the Notice. (*Id.*)

The Stancourts initially filed their request for an impartial due process hearing against the School District with the ODE on May 31, 2002. The Stancourts withdrew their request a short time later and then refiled it on August 26, 2002. (Pet. App. at 6a) The hearing request alleged that the School District had denied Gregory Stancourt FAPE.

On October 2, 2002, the Impartial Hearing Officer ("IHO") appointed by the Ohio Department of Education to conduct the administrative hearing issued a decision regarding Gregory Stancourt's stay put placement during the pendency of the administrative proceedings. (Pet. App. at 7a) The decision was necessitated by a dispute between the parties about whether Gregory's IEP included the addendum the School District proposed on April 10, 2002. (Pet. App. at 8a) The IHO determined that the IEP included the April 10th addendum. (*Id.*)

On February 13, 2003, the IHO dismissed Petitioners' due process proceedings with prejudice based on their failure to comply with the IHO's order to release Gregory's medical and mental health treatment records to the School District. (Pet. App. at 8a) This decision was appealed to a State Level Review Officer ("SLRO"), appointed by the Ohio Department of Education, who amended the order to a dismissal without prejudice. (*Id.*) The SLRO did not address the stay put placement. (*Id.*)

Petitioners appealed to the Franklin County Court of Common Pleas, and, on July 27, 2004, the court issued a judgment, reversing the IHO and SLRO dismissals, and affirming the IHO's determination that the April 10, 2002 addendum was a part of Gregory's stay put IEP. (Pet. App. at 8a)

Petitioners then appealed to the Franklin County Court of Appeals, Tenth Appellate District, arguing that the IHO erred in determining that the April 10, 2002 amendment was a part of stay put placement. (Pet. App.

at 8a) The School District cross-appealed from the trial court's decision that the SLRO lacked authority to dismiss a due process request based on their failure to comply with the IHO's order to release medical and mental health records. (*Id.*) On October 27, 2005, the court of appeals affirmed the trial court's judgment reversing the dismissals of the Stancourts' due process hearing request. (Pet. App. at 9a) With respect to whether the April 10, 2002 addendum was part of Gregory's stay put placement, the court of appeals held that the trial court erred in failing to make the necessary finding of whether the April 10, 2002 addendum implicated a detrimental change in the elements of the IEP or fundamentally changed or eliminated a basic element of the IEP. (*Id.*) The Tenth Appellate District remanded the matter for the trial court to make that determination. (*Id.*) The Court also directed the trial court to consider whether the School District deviated from the procedural requirements of the IDEA in providing written notice to the Stancourts two days after the April 10, 2002 addendum was implemented, and if so, whether the deviation resulted in substantive harm. (*Id.*)

On remand, a magistrate conducted an evidentiary hearing and considered expert testimony from both parties, documentary evidence submitted by both parties, the administrative record and the arguments of counsel. (Pet. App. at 9a) The magistrate issued a decision on March 20, 2007, finding and concluding that the April 10, 2002 addendum neither implicated a detrimental or fundamental change to Gregory's IEP nor eliminated a basic element of the IEP. (*Id.*) The magistrate also found that, while a technical violation

may have occurred in that the Stancourts received the written notice of the April 10, 2002 IEP addendum's implementation two days after implementation had begun, there was no resulting substantive harm. (Pet. App. at 10a)

The Stancourts objected to the magistrate's decision, and, on July 26, 2007, the trial court adopted the decision. (Pet. App. at 10a) Final judgment was entered by the trial court on September 13, 2007, dismissing the Stancourts' appeal. (*Id.*)

Once again, the Stancourts appealed to the Franklin County Court of Appeals, Tenth Appellate District, asserting a single assignment of error – that "the trial court committed reversible error in finding that Gregory Stancourt was not harmed by the actions of the Worthington City Schools." (Pet. App. at 10a) On September 9, 2008, the court of appeals rendered its opinion, affirming the judgment of the trial court in its entirety. (Pet. App. at 21a and 22a) The Stancourts petitioned the Ohio Supreme Court for review of the Tenth Appellate District's determinations. (Pet. App. at 148a) That court declined to exercise its discretionary jurisdiction over the matter. (*Id.*)

Petitioners now request that this Court grant certiorari even though there has been no decision on the merits of the Stancourts' underlying claim. All of the administrative and judicial review to date has been on procedural issues. It has been determined that the administrative proceedings should not have been dismissed for the Stancourts' failure to provide Gregory's medical and mental health treatment records.

It has also been determined that Gregory's stay put IEP for the duration of the administrative proceedings is his 2002 IEP, which includes the April 10, 2002 addendum. The proper venue now is for the IHO to determine, in an administrative proceeding, whether the School District denied Gregory Stancourt a free appropriate public education as alleged in the due process hearing request filed by the Stancourts on August 26, 2002. Until a decision on the merits is issued and the administrative remedies contemplated by the IDEA are exhausted, this case is not final.

REASONS FOR DENYING THE PETITION

I. THE OPINION OF THE TENTH APPELLATE DISTRICT COURT COMPORTS WITH THE SCOPE AND THE INTENT OF THE IDEA, THE DECISIONS OF THIS COURT AND THE STANDARD APPLIED BY THE FEDERAL CIRCUIT COURTS.

In *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176 (1982), the case in which this Court was first called upon to interpret a provision of the Act, the Court noted the importance Congress attached to the procedural safeguards contained in Section 1415 of the Act and established a two-part inquiry for suits brought under that Section. 458 U.S. at 187, 205, and 206-207. First, it should be determined whether the State complied with the procedures set forth in the Act. *Id.* at 206. Second, it should be determined whether the IEP developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits.

Id. at 206-207. In articulating this standard, the Court remained mindful of the intent underlying the Act, which was ". . . primarily to make public education available to handicapped children . . ." *Id.* at 191.

Heeding the Court's dictates, the federal circuit courts began fashioning a standard for determining when a party's violation of the Act's procedures constitutes a substantive denial of FAPE. They ultimately responded with a reasonable approach that best serves the interests of the parties while adhering to the intent of the Act: a party's procedural violation of the Act will constitute a denial of FAPE to a child only if the violation causes harm to the child or the parents' opportunity to participate in the IEP process. *See, e.g., W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir. 1992); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990); *Doe v. Alabama State Dept. of Educ.*, 915 F.2d 651, 661-662 (11th Cir. 1990); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990). This common sense approach properly denies the promotion of form over substance and ensures that any deviation from the IDEA's many complex procedural requirements will not interfere with school districts' provisions of special education services to disabled children *unless* that procedural deviation has resulted in actual harm. Petitioners' arguments for certiorari unjustly attribute malicious intent to every school district that happens to violate one of the Act's procedural safeguards – procedures this Court characterizes as "elaborate and highly specific." *Rowley*, 458 U.S. at 205. Regardless, parents are "likewise obligated to operate within the Act's procedural framework," so the necessity that harm

result from any procedural violation prevents their missteps from interfering with the provision of special education services to their children as well. *Cordrey v. Euckert*, 917 F.2d 1460, 1466 (6th Cir. 1990), *cert. denied*, 499 U.S. 938 (1991).

The actionable harm contemplated by the standard is specific to each situation and has been found to range from the keeping of insufficient data and the withholding of information from a student's parents, *Metropolitan Bd. of Pub. Educ. v. Guest*, 193 F.3d 457, 459, 464-465 (6th Cir. 1999), to a failure to formally offer an educational placement to a disabled student. *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1525-1527 (9th Cir. 1994), *cert. denied*, 513 U.S. 965 (1994). Again, the element common to these seemingly-unrelated procedural violations is the existence of harm.

A. The Sixth Circuit's Limitation that a Procedural Violation is Only Actionable if it Causes Substantive Harm Does Not Conflict with the Standard Applied by Any Other Circuit.

The Tenth Appellate District Court relied on two Sixth Circuit cases in determining that no substantive harm existed in the present matter, *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 764 (6th Cir. 2001), *cert. denied*, 533 U.S. 950 (2001), and *Dong v. Board of Educ. of Rochester Comm. Schs.*, 197 F.3d 793, 801 (6th Cir. 1999). (Pet. App. at 22a -23a) In *Knable*, the Sixth Circuit reviewed the two-part standard this Court established in *Rowley* and stated that "a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation

causes substantive harm to the child or his parents." 238 F.3d at 765 (*citations omitted*). The court adopted its definition of "substantive harm" from the Ninth Circuit, explaining, "Substantive harm occurs when the procedural violations in question seriously infringe upon the parents' opportunity to participate in the IEP process." *Id.* (*citing W.G.*, 960 F.2d at 1484). The Sixth Circuit further stated that "procedural violations that deprive an eligible student of an individualized education program or result in the loss of educational opportunity also will constitute a denial of a FAPE under the Act." *Id.* at 766 (*citations omitted*).

In *Dong*, the Sixth Circuit explained, "While we strictly review an IEP for procedural compliance, technical deviations do not render an IEP invalid." 197 F.3d at 801 (*citations omitted*). The court's statement reflects its consideration of and adherence to this Court's *Rowley* inquiries while applying a workable standard to the circumstances presented for its review.

The Tenth Appellate District Court correctly determined that no substantive harm occurred in the present matter because the Stancourts were not precluded from meaningful participation in the IEP process. (Pet. App. at 22a) Rather, they fully participated in the creation of their son's January 2002 IEP, including the behavior plan that contemplated the thinning of behavioral reinforcers upon Gregory's mastery of targeted behaviors, and consented to its implementation. (Pet. App. at 23a) Furthermore, the Stancourts actually met with School District representatives on April 10, 2002, where they were presented with the draft

addendum that called for the actual thinning of those reinforcers. (*Id.*) The addendum also required the reinstatement of the behavioral reinforcers contained in the January 2002 IEP if Gregory's mastery of the targeted behaviors lapsed. (Pet. App. at 23a-24a) The Stancourts did not consent to implementation of the addendum that day.

The procedural violation of which the Stancourts complain is their receipt of the School District's prior written notice a mere two days after the gradual thinning of reinforcers began on April 15, 2002. Despite their alleged ire, the Stancourts waited nearly six weeks to initiate due process proceedings against the School District, only to withdraw them and then refile them again three months later. (Pet. App. at 23a)

As accurately explained by the Tenth Appellate District, "The Stancourts were involved in each step of the development and implementation of Gregory's IEP. That they disagreed with implementation of the April 10, 2002 addendum does not equate to a finding of substantive harm." (Pet. App. at 23a) If the Stancourts had been denied the opportunity to participate in the IDEA's processes or Gregory had either been denied an IEP or lost educational opportunities, the School District's alleged procedural violation would have been actionable under the standard applied by the Sixth Circuit and, consequently, Ohio's Tenth Appellate District Court. The fact remains that neither Petitioners nor their son suffered any harm. The Stancourts fully participated in the development of their son's IEP, were consulted regarding the April 10th addendum and were provided notice of all their rights under the Act, and

Gregory received the special education and related services contained in his IEP.

Petitioners attempt to set aside the Tenth Appellate District's determinations by creating a conflict among the federal appellate circuits that simply does not exist. Petitioners assert that both the Fourth and Fifth Circuit Courts of Appeals "have specifically held that a school district's failure to comply with the procedural requirements of the IDEA constitutes a *per se* violation of the Act" and cite two cases in support of that proposition, *Jackson v. Franklin County Sch. Bd.*, 806 F.2d 623, 629 (5th Cir. 1986), and *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985). (Pet. at 25) (emphasis in original).

In *Jackson*, the Fifth Circuit purported to adopt Petitioners' alleged per se violation analysis but remanded the matter to the district court for a determination of the loss caused by the school district's procedural violation. *Doe v. Alabama State Dept. of Educ.*, 915 F.2d at 662 (*analyzing and citing Jackson*, 806 F.2d at 631). In *Hall*, the Fourth Circuit described the school district's repeated failures to notify the parents of their rights under the Act and its concomitant failure to develop an adequately specific IEP and then noted, "Under *Rowley*, these failures to meet the Act's procedural requirements are adequate grounds by themselves for holding that the school failed to provide James a FAPE . . ." 774 F.2d at 634, 635. However, the court found that the school district's repeated denials of information to the parents concerning their rights interfered with their ability to effectively participate in the IEP processes provided by the Act. *Id.* at 633, 634.

In both *Jackson* and *Hall*, the presence of real harm actually drove the courts' analyses and determinations. Regardless, more recent decisions by both the Fourth and Fifth Circuits disavow their alleged adoption of a per se standard.

For example, in *Speilberg v. Henrico County Pub. Schs.*, 853 F.2d 256 (4th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989), the Fourth Circuit held that a procedural violation constituted a denial of FAPE when the school's decision to place the child at a particular facility without first developing an IEP denied the student's parents involvement in the decision-making process as provided by the Act. 853 F.2d at 259. Similarly, in *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200 (4th Cir. 1990), the Fourth Circuit Court of Appeals looked to the harm flowing from the school district's violation of time limits established by state regulations to determine that relief was warranted where the procedural violation delayed the establishment of an appropriate IEP for the student. 908 F.2d at 1207. In *DiBuo v. Board of Educ.*, 309 F.3d 184 (4th Cir. 2002), the court explained, "[U]nder our circuit precedent, a violation of a procedural requirement of the IDEA...must actually interfere with the provision of a FAPE." 309 F.3d at 190.

In *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003), the Fifth Circuit Court of Appeals expressly adopted the standard dictating that a procedural violation under the IDEA is not actionable unless it results in a student's loss of educational opportunity or infringes upon the parents' opportunity to participate in the IEP process. 328 F.3d at 812-813 (*citing W.G.*, 960 F.2d at 1484, and *Doe v. Defendant I*,

898 F.2d 1186, 1191 (6th Cir. 1990)). There can be no question that the Fifth Circuit agrees with the standard applied by the Sixth Circuit.

Every remaining federal appellate circuit requires a showing of harm before it will deem a procedural violation of the IDEA actionable. *G.N., ex rel. J.N., v. Board of Educ. of the Twnshp. of Livingston*, 309 Fed. Appx. 542, 2009 U.S. App. LEXIS 2455, at *10-*11 (3rd Cir. 2009) (*citing* 20 U.S.C. §1415(f)(3)(E)(i) and (ii), *W.G. v. Board of Trustees*, *infra*, and *Roland M. v. Concord Sch. Comm.*, *infra*, and requiring harm for a procedural violation committed during the formulation of a child's IEP to be actionable); *Hjortness v. Neenah Joint Sch. Dist.*, 507 F.3d 1060, 1065 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 2962, 171 L.Ed. 2d 906 (2008) ("Procedural flaws do not require a finding of a denial of a free appropriate public education. However, procedural inadequacies that result in the loss of educational opportunity result in the denial of a free appropriate public education."); *Lesesne v. District of Columbia*, 447 F.3d 828, 832 (D.C. Cir. 2006) ("[V]iolations of IDEA's procedural requirements are actionable only if they affect a student's substantive rights."); *Stringer v. St. James R-1 Sch. Dist.*, 446 F.3d 799, 803-804 (8th Cir. 2006) ("The district court properly dismissed the claim for a violation of written notice" where it found "plaintiffs both participated in developing the IEP and had actual notice of the IEP meeting where discussion occurred."); *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 192 (2nd Cir. 2005) ("In considering whether the District fulfilled IDEA's procedural obligations, we focus on whether the Cerras had an adequate opportunity to participate in the development of

Kathryn's IEP."); *Logue v. Unified Sch. Dist. No. 512, Shawnee Mission*, 153 F.3d 727 (table), 1998 U.S. App. LEXIS 16280, at *9 (10th Cir. 1998) ("[A]ny deficiency in the IEP process must result in prejudice to the student or his parents before a court may find that the IDEA was violated."); *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d at 1484 ("Procedural flaws do not automatically require a finding of denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity . . . or seriously infringe the parents' opportunity to participate in the IEP formulation process . . . clearly result in the denial of FAPE.") (*citations omitted*); *Doe v. Alabama State Dept. of Educ.*, 915 F.2d at 663 ("[T]he school's violation of the letter of the requirement does not require relief where, as here, the parents fully participated in the IEP process and there was no harm flowing from the procedural violation."); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (*en banc*), *cert. denied*, 499 U.S. 912 (1991) ("Before an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of education benefits."). As a result, the conflict Petitioners assert as a basis for granting certiorari in this matter is illusory.

B. Congress Expressly Limited Actionable Procedural Violations to Those that Result in Actual Harm.

Congress re-authorized the IDEA in 2004, substantively revising its terms and including new language that is particularly relevant to this Petition. *See* Title 20, U.S. Code, Pub. L. 108-446, 118 Stat. 2647 (2004), amending 20 U.S.C. §§1400 *et seq.* Congress essentially adopted the standard articulated by the federal appellate circuits and codified it in the re-authorized IDEA at Section 1415(f)(3)(E)(ii). That Section now provides:

> (ii) Procedural issues
>
> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education *only if* the procedural inadequacies –
>
> (I) impeded the child's right to a free appropriate public education;
>
> (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
>
> (III) caused a deprivation of educational benefits.

20 U.S.C. §1415(f)(3)(E)(ii) (emphasis added); *see also Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525

(2007) (*citing* 20 U.S.C. §1415(f)(3)(E)(ii) as a standard the States must follow in conducting due process hearings). This statutory provision is substantially similar to the Sixth Circuit's determination that a procedural violation of the Act is only actionable if it results in substantive harm. *Knable*, 238 F.3d at 765-766 (finding that substantive harm occurs when the procedural violations "seriously infringe upon the parents' opportunity to participate in the IEP process" and that procedural violations depriving an eligible student of an IEP or result in the loss of educational opportunity are denials of a FAPE). Since Congress has expressly provided the Act's specialized adjudicators the standard to apply when confronting a party's procedural violations of the Act — one that replicates the very standard Petitioners question in their Petition —, there is no need for this Court to address the issue.

II. THE COURT SHOULD DEFER TO CONGRESS, THE UNITED STATES DEPARTMENT OF EDUCATION AND THE OHIO DEPARTMENT OF EDUCATION AND REFUSE TO DEFINE "EDUCATIONAL PLACEMENT".

Section 1415(j) of the IDEA in effect at the time Petitioners initiated the due process proceedings underlying this matter provides, in its entirety:

> Except as provided in subsection (k)(7) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current

> educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

20 U.S.C. §1415(j), Title 20, U.S. Code, Pub. L. 105-17, 111 Stat. 37, 93 (1997). The requirement that a child remain in his or her "then-current educational placement" upon the initiation of due process proceedings is commonly referred to as "stay put" and connotes "preservation of the status quo." *Thomas*, 918 F.2d at 625-626. The stay put provision is intended to "prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings." *Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 471 U.S. 359, 373 (1985) (evaluating a former stay put provision found at 20 U.S.C. §1415(e)(3)).

Congress declined to define the phrase "educational placement" when it enacted each of the predecessors to today's IDEA. Further, Congress has refused to define the phrase even though it has revisited the Act sixteen times in the last twenty years and substantively revised Section 1415 in 2004. *See* Title 20, U.S. Code, Pub. L. 108-446, Sec 615(j), 118 Stat. 2647, 2725 (2004), amending 20 U.S.C. §1415(j). As a result, and as noted by the Tenth Appellate District, the courts are defining "educational placement" within the parameters of the factual circumstances presented to them. (Pet. App. at 15a (*citing AW, ex rel. Wilson, v. Fairfax County Sch. Bd.*, 372 F.3d 674, 679 (4th Cir. 2004) (*quoting Board of*

Educ. v. Illinois State Bd. of Educ., 103 F.3d 545, 548-549 (7th Cir. 1996)) and *Brimmer v. Traverse City Area Pub. Schs.*, 872 F. Supp. 447, 452 (D.C. Mich. 1994) (*citing DeLeon v. Susquehanna Comm. Sch. Dist.*, 747 F.2d 149, 153 (3rd Cir. 1984)))). Congress is presumed to be aware of the judicial interpretations accorded its statutes, but it has not acted despite the range of circumstances the courts have deemed educational placement. *See Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 782 n.15 (1985). The Court should not legislate for Congress by providing a definition that Congress, itself, has elected not to create. *See Honig v. Doe*, 484 U.S. 305, 325 (1988) ("[W]e are not at liberty to engraft onto the statute an exception Congress chose not to create.").

The United States Department of Education has likewise refused to provide a definition for "educational placement" despite its use of the phrase in its current regulations. *See, e.g.*, 34 C.F.R. §§300.116, 300.518 (formerly §300.514, Title 34, C.F.R., 64 Fed. Reg. 12406, 12452 (1999)). When promulgating its currently-effective regulations under the IDEA, the DOE received a comment that recommended "including in the regulations the Department's policy that a child's placement in an education program that is substantially and materially similar to the former placement is not a change in placement." 71 Fed. Reg. 46588 (2006). The DOE declined to include the recommendation, stating:

> . . . [I]t is the Department's longstanding position that maintaining a child's placement in an educational program that is substantially and materially similar to the former placement is not a change in

> placement. We do not believe further clarification is necessary in the regulations, however, as the distinction seems to be commonly accepted and understood.

71 Fed. Reg. at 46588-89 (2006). The commonly accepted and understood standard provides that a change in placement cannot exist without, "at a minimum, a fundamental change in, or elimination of[,] a basic element of the education program in order for the change to qualify as a change in educational placement." *Lunceford v. District of Columbia Bd. of Educ.*, 745 F.2d 1577, 1582 (D.C. Cir. 1984); *accord Tennessee Dept. of Mental Health and Mental Retardation v. Paul B.*, 88 F.3d 1466, 1474 (6th Cir. 1996) *(citing Lunceford, supra); Sherri A.D. v. Kirby*, 975 F.2d 193, 206 (5th Cir. 1992) (*citing Lunceford, supra*).

Ohio's Department of Education has also seen no need to define "educational placement."[2] Rather, its administrative regulations effective when Petitioners initiated this litigation simply provided, "During the pendency of any impartial due process hearing or subsequent appeals, unless the parent and the school district agree otherwise, the child involved in the complaint must remain in his or her present educational placement." O.A.C. §3301-51-02(G)(6)(a), effective February 28, 1997. The phrase "educational placement" remains undefined in Ohio's current Administrative

2. Section 1415(a) of the Act requires the ODE to establish and maintain procedures to "ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education . . ." 20 U.S.C. §1415(a).

Code as well. Notably, Ohio's General Assembly has not defined the phrase either.

The Court should continue to defer to the actions, and inactions, of Congress, the DOE and ODE, and Ohio's legislature by declining to accept jurisdiction in this matter. *See Honig*, 484 U.S. at 325 n.8 (*citing INS v. Cardoza-Fonesca*, 480 U.S. 421, 448 (1987) and deferring "to the construction adopted by the agency charged with monitoring and enforcing the statute" absent a statutory definition or instructive legislative history concerning the meaning of "change in placement"); *Rowley*, 458 U.S. at 208 (*quoting San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) and cautioning that "courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy'."). Upon this Court's denial of certiorari, the courts will continue to accord the phrase "then-current educational placement" its plain meaning under the specific facts presented them. *See Thomas*, 918 F.2d at 625; *see also Burlington*, 471 U.S. at 369 (relying on the "ordinary meaning" of the Act's language).

Ohio's Tenth Appellate District Court correctly determined that the April 10th addendum to Gregory Stancourt's IEP did not constitute a change in his educational placement. (Pet. App. at 21a) The thinning of reinforcers was clearly contemplated under the January 2002 IEP that Petitioners helped to develop and to which they consented. (Pet. App. at 20a) This pre-acknowledged thinning, coupled with the addendum's provision requiring reinstatement of the behavioral reinforcers in the event Gregory's mastery

of the targeted behaviors lapses, neither changes nor eliminates a basic element of his education program. *See Lunceford*, 745 F.2d at 1582. No change in placement occurred, and the April 10, 2002 addendum is properly part of the special education services the School District has provided Gregory during the pendency of these administrative proceedings.

Petitioners' stated concern that school districts will intentionally manipulate the placement of their choosing as a child's stay put is unwarranted. Had the thinning of reinforcers implemented through the April 10th addendum changed or eliminated Gregory's basic education program, the Tenth Appellate District would have deemed it a change in placement under its stated standard and, consequently, denied the addendum's implementation during these proceedings. Moreover, had Petitioners truly been concerned about the thinning of reinforcers on their son's behavior plan, they would have initiated the due process proceedings underlying this matter immediately rather than waiting three months. Regardless, it is evident that the courts are construing "educational placement" in a manner that realizes the intent of the IDEA and ensures the provision of special education and related services to disabled children under the Act.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Respondents, therefore, respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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